TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 44

JOSEPH D. McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, PETITIONER,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED MAY 8, 1939.

CERTIORARI GRANTED JUNE 5, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 943

JOSEPH D. McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, PETITIONER,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 9, 1939.

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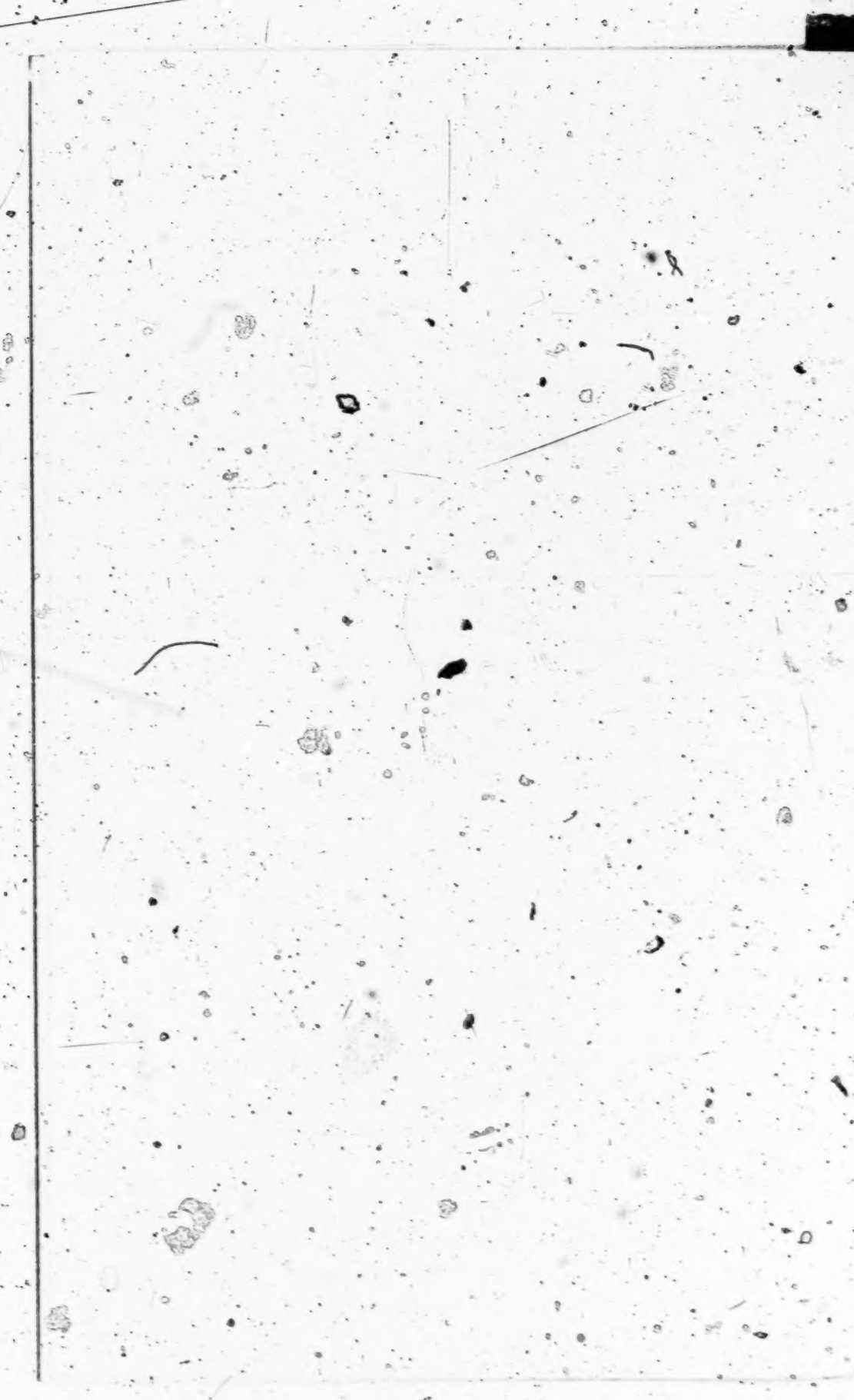

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of the Application of COMPAGNIE GENERALE TRANSATLANTIQUE, Petitioner,

For an Order

against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Respondent

STATEMENT UNDER RULE 234

The petition and notice of application for relief under Article 78 of the Civil Practice Act were served on the 12th day of November, 1937, together with a bond in the amount of $500 furnished by Compagnie Generale Transatlantique and approved by Mr. Justice Isidor Wasservogel on the same day.

The Comptroller duly served his answer and made his return on the 11th day of December, 1937.

Compagnie Generale Transatlantique, on the 13th day of December, 1937, duly served its reply to the answer of the Comptroller.

[fol. 2] The order transferring the proceeding for disposition to the Appellate Division, First Department, was signed by Mr. Justice William Harmon Black on the 29th day of December, 1937.

Haight, Griffin, Deming & Gardner, 80 Broad Street, New York, N. Y., appear as attorneys for Compagnie Generale Transatlantique. Paul Windels, Esq., Corporation Counsel, originally appeared for respondent, Frank J. Taylor, Comptroller of the City of New York; the respondent at present is represented by William C. Chanler, Esq., Corporation Counsel. There have been no other changes in attorneys or parties herein except that Frank J. Taylor was succeeded as Comptroller of the City of New York on January 1, 1938 by Joseph D. McGoldrick.

[fol. 3] IN SUPREME COURT OF NEW YORK, SPECIAL TERM, PART I, COUNTY OF NEW YORK

Present: Honorable William Harmon Black, Justice.

In the Matter of the Application of COMPAGNIE GENERALE TRANSATLANTIQUE, Petitioner, to Review a Determination of FRANK J. TAYLOR, as Comptroller of the City of New York, Respondent

ORDER TRANSFERRING PROCEEDING TO APPELLATE DIVISION, FIRST DEPARTMENT—December 29, 1937

The petitioner having moved this Court for relief or an order to review the assessments and determinations made by Frank J. Taylor as Comptroller of the City of New York, the respondent herein, assessing or determining that there is due from the Compagnie Generale Transatlantique, petitioner herein, to the City of New York, the sum of $26,955.70 or any part thereof or any other sum as tax, interest or penalties upon the purchase price of the [fol. 4] bunker fuel oil or diesel fuel oil referred to in said determinations, whether under Local Law 20 of 1934, or Local Law 25 of 1934, or amendments thereto, or under any other statutes or laws, and for the refund of the tax with interest or penalties deposited with the respondent by the petitioner, and the said petition having duly come on to be heard before me at a Special Term, Part I, for the hearing of motions, on the 13th day of December, 1937.

Now, upon reading and filing the petition and the exhibits annexed thereto, the answer of the respondent Frank J. Taylor, Comptroller of the City of New York, and the exhibits annexed thereto, and the reply of the petitioner, and due deliberation having been had, and the Court having made and filed its opinion, it is on motion of Haight, Griffin, Deming & Gardner, attorneys for petitioner,

Ordered that the motion be and the same hereby is granted to the extent of directing that the proceedings be transferred for disposition to the Appellate Division of the Supreme Court of the State of New York, First Department, in accordance with the provisions of Section 1296 of the Civil Practice Act.

Enter.

W. H. B., J. S. C.

[fol. 5] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPLICATION

SIR:

Please take notice that on the annexed petition of Compagnie Generale Transatlantique, duly verified the 12th day of November, 1937, application will be made at Special Term, Part I, to be held at the County Court House, Borough of Manhattan, City, County and State of New York, on the 22nd day of November, 1937, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for relief or an order reviewing the determination of the defendant to the effect that the petitioner is subject to the New York City Retail Sales Tax under Local Law No. 20 as amended by Local Law No. 24, or the New York City Personal Property Tax under Local Law No. 25 of 1934, as amended, and that there is due and payable to the [fol. 6] City of New York a balance of tax deficiency under the said laws or either of them in the sum of $26,955.70 based on purchases of fuel oil or diesel gas oil, and for such other and further relief as may be just.

Yours, etc., Haight, Griffin, Deming & Gardner, Attorneys for Petitioner, 80 Broad Street, New York, N. Y.

To: Frank J. Taylor, Esq., Comptroller of the City of New York, Municipal Building, New York, N. Y.

[fol. 7] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Same title]

PETITION

To the Supreme Court of the State of New York, County of New York:

The petition of Compagnie Generale Transatlantique respectfully shows to this Court:

1. That at all times hereinafter mentioned, the petitioner was and still is a corporation duly organized and existing under and by virtue of the laws of the Republic of France.

2. That at all times hereinafter mentioned, the petitioner had and still has offices at 610 Fifth Avenue, Borough of Manhattan, City and State of New York.

3. That the sole business of the petitioner is the ownership and operation of ocean-going vessels under the French flag in the transportation of passengers and freight in foreign commerce, and particularly between the port of New York and the ports of the Republic of France and of other foreign countries.

4. That the petitioner does not transport either passengers or freight from any place within the State of New York to any other place within the State of New York, nor [fol. 8] has the petitioner engaged in the sale of personal property within the State of New York other than the booking of passengers and freight for its said vessels.

5. That the above named Frank J. Taylor is Comptroller of the City of New York.

6. That on or about May 5, 1936, the aforesaid Comptroller caused a notice to be sent to the petitioner proposing to assess a tax against the petitioner pursuant to Local Law No. 20 of 1934 (also referred to as the New York City Retail Sales Tax) as amended, in the amount of $25,534.50, with interest thereon in the amount of $2,905.18, for the period from December 10, 1934, to December 31, 1935, a copy of said notice with annexed exhibits and schedules thereto annexed being hereto attached and marked Exhibit A.

7. That by enacting Chapter 873 of the Laws of 1934 (also referred to as the Enabling Act) the New York legislature enabled any city in the State having a population of one million or more to adopt local laws imposing taxes of limited application, for relief of its people from the hardships brought about by unemployment. The provisions of this law are incorporated herein by reference.

8. That pursuant to said Enabling Act, the Municipal Assembly of the City of New York adopted Local Law No. 20 of 1934 (also referred to as the New York City Retail Sales Tax) which was amended by Local Law No. 24 of 1934; and also adopted Local Law No. 25 of 1934 (also referred to as the New York City Personal Property Tax) [fol. 9] which was amended by Local Law No. 13 of 1935.

9. That on or about June 3, 1936, and within thirty days after the date of the said notice Exhibit A, the petitioner by its duly authorized attorneys at law protested in writing against the proposed assessment and made application to the Comptroller for a hearing. A copy of said protest and application is attached hereto and marked Exhibit B.

10. That thereafter and on or about May 27, 1937, the Comptroller determined that there was due and payable to the City of New York from the petitioner herein a deficiency of $29,924.36 in the amount of the tax (including interest and/or penalties) for the period from December 10, 1934 to December 31, 1935, pursuant to the said Local Law No. 20 as amended for the year 1934.

Thereupon the petitioner agreed with the aforesaid determination with the exception of $25,918.80 representing the tax (including interest and/or penalties) assessed on the purchase by the petitioner of fuel oil during the said period, and the petitioner agreed to and did pay without protest to the Comptroller on or about May 28, 1937, the balance of $4,005.36, leaving the sales tax assessed by the said Comptroller against the petitioner herein on the purchase of fuel oil in the amount of $20,738.22, with interest or penalty thereon to May 27, 1937 of $5,180.58, or a total of principal and interest or penalty to said date of $25,918.80.

A copy of the said further determination and agreement between the said Comptroller and the petitioner is hereto annexed marked Exhibit C.

{fol. 10} 11. That thereafter hearings were held and the petitioner presented facts and argument in support of its contentions; the records of such hearings are incorporated herein by this reference.

12. That in the course of the said hearings a stipulation was entered into between the parties hereto in the following terms:

It is stipulated and agreed by and between the Corporation Counsel of the City of New York, acting on behalf of the Comptroller of the City of New York, and Haight, Griffin, Deming & Gardner, acting on behalf of Compagnie Generale Transatlantique, the taxpayer herein, that any penalties that may be assessed against the said taxpayer

by the City of New York in consequence of any tax liability arising out of the transactions under review in the present proceedings, shall be assessed only in accordance with and at the rates specified in Section 15 of Local Law No. 20 of 1934, as amended; and it is

Further stipulated and agreed that the tax deficiency claimed, in this proceeding, against the Compagnie Generale Transatlantique as taxpayer by the Comptroller of the City of New York shall for all purposes of this proceeding be treated and considered as an assessment of deficiency under Local Law 25 of 1934 as well as under Local Law No. 20 of 1934 as amended, notice of assessment and hearing under said Local Law 25 of 1934 as [fol. 11] amended by Local Law 13 of 1935 being waived by the said taxpayer; it being

Further stipulated and agreed that any rights given to the City under Local Law No. 25 of 1934, as amended, shall not be deemed waived in any respects except as above stipulated.

13. That on or about October 25, 1937, the Comptroller notified the petitioner of his final determination assessing the balance of deficiency of sales tax against the petitioner on its said purchases of fuel oil during the period from December 10, 1934 to December 31, 1935, in the sum of $20,738.22, with penalties of $6,217.48 pursuant to Section 7 of Local Law No. 20 of 1934 as amended. A copy of the said notice of final determination is annexed hereto, marked Exhibit D.

14. That the petitioner has paid over the said tax to the Comptroller in the sum of $20,738.22 together with interest or penalties thereon of $6,217.48.

15. That the assessment of said tax against the petitioner whether as a New York City Sales Tax or as a New York City Personal Property Tax is erroneous, illegal, improper, excessive, discriminatory, arbitrary and contrary to law for the following reasons:

(a) During the taxable period the petitioner being engaged in the transportation of passengers and freight solely in foreign commerce, and in the operation of its ves- [fol. 12] sels under the French flag in such commerce, the petitioner purchased fuel oil in the form of bonded bunker fuel oil and diesel fuel oil for use in its said vessels. Dur-

ing such period and for many years prior thereto the regular and established course of business, and the practice followed, was that the sellers deliver such bunker fuel oil and diesel fuel oil from the supplies in their installations in the State of New Jersey direct to the petitioner's ships at their piers in the City and State of New York, and the intention and contemplation of the sellers and of your petitioner as purchaser thereof was that the deliveries of such purchases be made in said regular and established course. That the tax in controversy herein is assessed on the purchase price paid by the petitioner only for such bunker fuel oil and diesel fuel oil.

(b) That the tax in controversy herein was assessed upon the purchase price paid on transactions in interstate and foreign commerce, and the State and City of New York are without power to impose said tax on said transactions by virtue of the provisions of the Constitution and laws of the United States, the Constitution and laws of the State of New York, the Enabling Act, and the Local Laws No. 20 of 1934 and No. 25 of 1934, as amended.

(c) That the said bunker fuel oil and diesel fuel oil are exempt from the City Sales Tax or the City Personal Property Tax under Article 1, Section 10, Clause 2 of the Constitution of the United States prohibiting the States from taxing exports.

(d) That the said bunker fuel oil and diesel fuel oil [fol. 13] purchased by the petitioner is exempt from the City Sales Tax or the City Personal Property Tax because said oil never became a part of the mass of property within the City.

(e) That the tax in controversy herein was assessed upon the purchase price paid on transactions which did not wholly take place within the City of New York and that such articles or commodities thus purchased were used outside the City of New York.

(f) That the City of New York is prohibited by Chapter 873 of the Laws of 1934 of the State of New York (the Enabling Act) from taxing the transactions involved herein.

(g) That the assessment of the New York City Personal Property Tax on the purchases by the petitioner of the

bunker fuel oil and diesel fuel oil for its steamers as aforesaid constitutes an impost and as such is prohibited by Article 1, Section 8, Clause 3 and by Article 1, Section 10, Clause 2 of the Constitution of the United States.

(h) That the New York City Personal Property Tax imposed by Local Law No. 25 of 1934, as amended, is arbitrary, unreasonable, discriminatory and unequal, and lacks uniformity, and is in these and other respects in violation of the rights of the petitioner herein under the Enabling Act, the New York State Constitution and the Constitution of the United States and its amendments.

16. That by reason of the foregoing the petitioner has had assessed against it and has paid over to the Comptroller the sum of $26,955.70 for tax and penalties which were assessed improperly, illegally and erroneously on the pur- [fol. 14] chase price of said bunker fuel oil and diesel fuel oil.

17. This application is timely and within the thirty days allowed by law.

No previous application for such relief or order has ever been made.

Wherefore, your petitioner prays that this Court review the assessments and determinations made by the said Frank J. Taylor, the respondent herein, assessing or determining that there is due from the Compagnie Generale Transatlantique, the petitioner herein, to the City of New York, the sum of $26,955.70 or any part thereof or any other sum as tax, interest or penalties, upon the purchase price of the bunker fuel oil or diesel fuel oil referred to in said determinations or in this petition, whether under said Local Law 20 of 1934, or said Local Law 25 of 1934, or amendments, or under any other statutes or laws, and further prays that any error committed in said rulings, assessments or determinations be corrected or reviewed and the tax, interest and penalties may be ordered refunded to the petitioner, and that the petitioner may have such other, further and different relief as to the Court may seem just.

Compagnie Generale Transatlantique, by J. L. Artur.
Haight, Griffin, Deming & Gardner, Attorneys for Petitioner, 80 Broad Street, New York, N. Y.

(Sworn to by Jean L. Artur as Assistant General Manager of Petitioner, Nov. 19, 1937.)

[fol. 15] EXHIBIT "A" ATTACHED TO PETITION

(Letterhead of)

The City of New York,

Department of Finance

Name: Campagnie Generale Transatlantique.
Address: 610 Fifth Ave. N. Y. C.
Registration Number M— 3.

May 5th, 1936.

Tax Deficiency Period Ended	Principal	Interest	Total
2/28/35	$4157.67	$706.80	$4864.47
5/31/35	4798.56	671.80	5470.36
8/31/35	9152.93	1006.81	10159.74
12/31/35	7425.34	519.77	7945.11
Total	25534.50	2905.18	28439.68

Compagnie General, Transatlantique, 610 Fifth Avenue, New York, N. Y.

GENTLEMEN:

The Comptroller hereby gives notice that based upon the exhibits and schedules hereto attached he has determined that there is due and payable to the City of New York a deficiency of $28439.68 in the amount of the tax (including interest and/or penalties) for the period from December 10, 1934 to December 31, 1935, pursuant to Local Law No. 20 of 1934, as amended.

Notice is hereby given that this determination shall finally and irrevocably fix the amount of tax due unless application in writing is made by you for a hearing thereon within [fol. 16] thirty days after date hereof.

Section 15 of Local Law No. 20 of 1934, as amended, provides in part as follows:

"Any person failing to file a return or to pay over any tax to the Comptroller within the time required by this Local Law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month

after such return was required to be filed or such tax became due * * *."

In the event of your failure to make application for a hearing within the time specified or to remit the tax assessed, the penalties as provided for in Section 15 hereinabove will become operative.

If you agree with the determination of your tax liability as stated above please remit the amount due together with this notice or a copy thereof, within thirty days after the date hereof.

Yours very truly, Milton Solomon, Deputy Comptroller.

[fol. 17]

EXHIBIT "A," ATTACHED TO FOREGOING EXHIBIT

The City of New York—Department of Finance—Emergency Revenue Division

50 Lafayette Street, New York, N. Y.

Name of Taxpayer Compagnie Generale Transatlantique.
Address 610 Fifth Ave. N. Y. C.
* Indicates Deduction

Registration No. M
Local Law No. 20 of 1934, as amended
Period Audited 12/10/34—12/31/35
Accountant Mamie J. Feingold

Item No.		Total	Period Audited 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No.
A	Tax Due the City of New York as reported (Item 10 of return)		$ —0—	—0—	—0—	—0—	
B	Add—Tax-Two per centum of additional taxable receipts (Exhibit C)		4157.67	4798.56	9152.93	7425.34	
C							
D	Total tax (Items A to C inclusive)		4157.67	4798.56	9152.93	7425.34	
E	Amount of tax—Two per centum of total receipts as adjusted (Exhibit B)		4157.67	4798.56	9152.93	7425.34	
F	Tax due the City of New York (Items D or E, whichever is greater)	$25534.50	4157.67	4798.56	9152.93	7425.34	
G	Amount of Tax Paid						
H	Balance of Tax unpaid (Item F minus Item G)	25534.50	4157.67	4798.56	9152.93	7425.34	
I	Add: Penalties to 4/15/36	2905.18	17% 706.80	14% 671.80	11% 1006.81	7% 519.77	
J	Total Tax due the City of New York (Item H plus Item I)	28439.68	4864.47	5470.36	10159.74	7945.11	

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[fol. 18]

EXHIBIT "B," ATTACHED TO FOREGOING EXHIBIT

The City of New York—Department of Finance—Emergency Revenue Division

50 Lafayette Street, New York, N. Y.

Name of Taxpayer Compagnie Generale Transatlantique.
Address 610 Fifth Ave. N. Y. C.
* Indicates Deduction

Registration No.
Local Law No. 20 of 1934, as amended
Period Audited 12/10/34—12/31/35
Accountant Mamie J. Feingold

Item No.	Receipts from Sales and Services as Adjusted	Period 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No.
1	Receipts from Sales (Not included in Items 2 or 3)	$	395.40	1645.15	371.00	
2	Receipts from installment sales					
3	Receipts from Sales and Services of gas, electricity, refrigeration, etc					
4	Value of property purchased without tax used by you or in your business	207883.56	239537.55	456001.59	370895.81	
5	Total Receipts (Items 1 to 4 inclusive)	$207883.56	239927.95	457646.74	371266.81	
	Less:—Allowable Deductions (Items 11 to 20 incl.)					
11	Receipts from sales for purpose of resale					
12	Receipts from sales of food products					
13	Receipts from sales of food in restaurants where the charge per patron is less than $1.00					
14	Receipts from sales to Federal, State and Municipal agencies					
15	Receipts from sales delivered outside the City					
16	Receipts from sales to Semi-public institutions					
17	Cash Discounts taken at time of sale and Trade Discounts					
18	Credits allowed on property accepted in part payment and intended for resale					
19	Credits allowed on property returned, cancelled sales and defective merchandise					
20	Other allowable deductions permitted by the law or regulations					
21	Total Allowable Deductions (Items 11 to 20 incl.)	$				
	Total Taxable Receipts as Adjusted (Item 5 minus 21)	$207883.56	239927.95	457646.74	371266.81	

See Exhibit A for Computation of Tax.

Item numbers correspond with item numbers on return.

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[fol. 19]

EXHIBIT "C," ATTACHED TO FOREGOING EXHIBIT

The City of New York—Department of Finance—Emergency Revenue Division

50 Lafayette Street, New York, N. Y.

Name of Taxpayer Compagnie Generale Transatlantique.
Address 610 Fifth Ave. N. Y. C.
* Indicates Deduction

Registration No. .....
Local Law No. 20 of 1934, as amended
Period Audited 12/10/34—12/31/35
Accountant Mamie J. Feingold

Item No.	Summary of Additional Taxable Receipts	Period 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No.
	Add—Taxable Receipts not Reported:					
1	Receipts from sales	$.....	390.40	1645.15	371.00	C-1
2	Receipts from installment sales	.....	.....	.....	.....	
3	Receipts from sales and services of gas, electricity, refrigeration, etc	.....	.....	.....	.....	
4	Value of property purchased without tax used by you or in your business	207883.56	239537.55	456001.59	370895.81	C-2
5	Total taxable receipts not reported (Items 1 to 4 inclusive)	$207883.56	239927.95	457646.74	371266.81	
	Add—Deductions Disallowed:					
11	Receipts from sales for purpose of resale	.....	.....	.....	.....	
12	Receipts from sales of food products	.....	.....	.....	.....	
13	Receipts from sales of food in restaurants where the charge per patron is less than $1.00	.....	.....	.....	.....	
14	Receipts from sales to Federal, State and Municipal agencies	.....	.....	.....	.....	
15	Receipts from sales delivered outside the City	.....	.....	.....	.....	
16	Receipts from sales to Semi-Public institutions	.....	.....	.....	.....	
17	Cash Discounts taken at time of sale and Trade Discounts	.....	.....	.....	.....	
18	Credits allowed on property accepted in part payment and intended for resale	.....	.....	.....	.....	
19	Credits allowed on property returned, cancelled sales and defective merchandise	.....	.....	.....	.....	
20	Other deductions permitted by law or regulations	.....	.....	.....	.....	
21	Total Deductions Disallowed (Items 11 to 20 incl.)	.....	.....	.....	.....	
	Total Additional Taxable Receipts (Item 5 plus 21)	$207883.56	239927.95	457646.74	371266.81	

See Exhibit A for Computation of Tax.

Item numbers correspond with item numbers on return.

[Fol. 20] SCHEDULE "C-1," ATTACHED TO FOREGOING EXHIBIT

M. J. Feingold, Acct.

Compagnie Generale Transatlantique

(French Line)

610 Fifth Avenue, New York, N. Y.

	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Item #1 of Return: Receipts from Sales			
Amount as reported	—0—	—0—	—0—
Add: Receipt from sales during taxable period, not reported (Note)	$390.40	$1645.15	$371.00
Amount as adjusted	$390.40	1645.15	371.00

NOTE.—Taxpayer's records indicate casual sales of empty barrels and equipment, a list of which was submitted to your Mr. Haessig.

[fol. 21] SCHEDULE "C-2," ATTACHED TO FOREGOING EXHIBIT

M. J. Feingold, Acct.

Compagnie Generale Transatlantique

(French Line)

610 Fifth Avenue, New York, N. Y.

	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Item #4 of Return: Value of property purchased without tax used by you in your business.				
Amount as reported	—0—	—0—	—0—	—0—
Add: Property purchased without tax on which tax is due (Note)	$207883.56	$239537.55	$456001.59	$370895.81
Amount as adjusted	$207883.56	239537.55	456001.59	370895.81

NOTE.—This amount represents property purchased without tax for purposes other than for resale as determined from an examination of taxpayer's purchase invoices and other records, and is in accordance with a list thereof submitted to your Mr. Haessig.

[fol. 22] EXHIBIT "B" ATTACHED TO PETITION

(Letterhead of)

Haight, Griffin, Deming & Gardner

June 3, 1936.

Milton Solomon, Esq., Deputy Comptroller, Department of Finance of the City of New York, 50 Lafayette Street, New York, N. Y.

Compagnie Generale Transatlantique, 610 Fifth Avenue, New York, N. Y. Deficiency Letter Dated May 5, 1936 Pursuant to Local Law No. 20 of 1934, Amount Assessed $28,439.68. Our file No. 522-229.

DEAR SIR:

With reference to your letter of notice dated May 5, 1936 as above, which has been referred to us by Compagnie Generale Transatlantique to whom it was addressed, with instructions to act as their attorneys at law in this matter, we hereby make application on behalf of the said Compagnie Generale Transatlantique for a hearing on the alleged deficiency of $28,439.68 tentatively assessed in your said communication, against which proposed assessment the said Compagnie Generale Transatlantique hereby protests as to the whole of the said alleged deficiency and as to each and every item and part thereof.

Respectfully yours, Haight, Griffin, Deming & Gardner, Attorneys for Compagnie Generale Transatlantique (Sgd.) by Herbert K. Stockton.

HKS:LL.

[fol. 23] EXHIBIT "C" ATTACHED TO PETITION

Form 270-A.

The City of New York

Department of Finance,

Emergency Revenue Division,

50 Lafayette Street, New York, N. Y.

Date: —— —, ——.
Registration No. —.
Tax Deficiency.

Period ended	Principal	Interest	Total
2/28/35	$3,956.37	$1,158.32	$5,114.69
5/31/35	4,574.91	1,037.30	5,612.21
8/31/35	8,901.91	1,997.71	10,899.62
12/31/35	6,908.75	1,389.09	8,297.84
Total	$24,341.94	$5,582.42	$29,924.36

Name: Compagnie Generale Transatlantique.
Address: 610 Fifth Avenue, New York City.

The Comptroller hereby determines that there is due and payable to the City of New York from the taxpayer hereunder a deficiency of $29,924.36 in the amount of the tax (including interest and/or penalties) for the period from December 10, 1934 to December 31, 1935, pursuant to Local Law No. 20 as amended, for the year 1934.

The taxpayer hereinabove agrees with the aforesaid determination with the exception of $25,918.80 representing the tax (including penalties) assessed in the purchase of [fol. 24] fuel oil. The balance of $4,005.56 the taxpayer agrees to pay without protest on or before June 5, 1937.

Name of business taxpayer: (Sgd.) Compagnie Generale Transatlantique, by Haight, Griffin, Deming & Gardner.

	Principal	Interest or Penalty	Total
Fuel oil	$20,738.22	$5,180.58	$25,918.80
Conceded tax due	3,603.72	401.84	4,005.56
Total	$24,341.94	$5,582.42	$29,924.36

[fol. 25] EXHIBIT "D" ATTACHED TO PETITION

(Letterhead of)

The City of New York,

Department of Finance

October 25, 1937.

City Sales Tax.
Final Determination.

Re:
Name: Compagnie Generale Transatlantique.
Address: 610 Fifth Avenue, New York, N. Y.
Registration No.: Misc.

Tax Deficiency	$30,961.26
Less Amount Paid	4,005.56
Balance Due	$26,955.70

Local Law #20 of 1934 as amended.
Period: From December 10, 1934 to December 31, 1935.

Compagnie Generale Transatlantique, 610 Fifth Avenue, New York, N. Y.

GENTLEMEN:

The Comptroller hereby determines that as a result of hearings held in this office in connection with your tax liability to the City of New York for the period from December 10, 1934 to December 31, 1935, pursuant to Section 7 of Local Law #20 of 1934, as amended, there is due and payable to the City of New York a balance of tax deficiency of $26,955.70 as indicated on the schedule attached hereto.

This determination, which is final and irrevocable, is [fol. 26] based on purchases of fuel oil within the City of New York upon which no tax was paid to your vendors.

Payment of the tax due must be made to this office within thirty days from the date hereof and this letter or a copy thereof should accompany your remittance. Checks and money orders should be made payable to the order of the City Collector and forwarded to the Comptroller of the City of New York at 50 Lafayette Street, New York City.

In the event of your failure to pay the tax due, the Comptroller will issue a warrant in accordance with the law. Section 8 of Local Law #20 of 1934, as amended, provides in part as follows:

"Whenever any vendor * * * shall fail to pay over any tax and/or to pay any tax or penalty imposed by this local law * * * the Comptroller may issue a warrant directed to the Sheriff of any county within the City of New York commanding him to levy upon and sell the real and personal property of the vendor * * * which may be found within the county for the payment of the amount hereof, with any penalties and the cost of executing the warrant * * *."

This determination supersedes the notice of final determination mailed to you on October 13, 1937.

Very truly yours, Milton Solomon, Deputy Comptroller.

PI:CM.
Enc.

[fol. 27] Compagnie Generale Transatlantique

610 Fifth Avenue, New York, N. Y.

Schedule Showing Tax Deficiency Pursuant to Local Law # 20 of 1934, as Amended

Misc.

Period 12/10/34 to 12/31/35 Period Ended	Principal	Paid on Account	Balance of Tax Due	Penalties	Total
2/28/35	$3956.37	$197.62	$3758.75	$1315.56	$5074.31
5/31/35	4574.91	1341.38	3233.53	1034.73	4268.26
8/31/35	8901.91	1570.77	7331.14	2199.34	9530.48
12/31/35	6908.75	493.95	6414.80	1667.85	8082.65
Tax Due	$24341.94				
Tax Paid 6/2/37		$3603.72			
Penalties Paid 6/2/37		401.84			
Total Payment 6/2/37		$4005.56			
Balance due on tax			$20738.22		
Penalties due on balance				$6217.48	
Total Tax and Penalties Due					$26955.70

October 25, 1937

[fol. 28] In Supreme Court of New York, County of New York

[Same title]

Comptroller's Answer to Petition

The respondent, Frank J. Taylor, Comptroller of the City of New York, answering the petition herein:

1. Denies each and every allegation contained in paragraphs of said petition marked and numbered 15 and 16.

2. Denies any knowledge or information sufficient to form a belief as to allegations contained in paragraphs of said petition marked and numbered 3 and 4.

3. Denies each and every allegation set forth in paragraph 7 of the petition except that the respondent admits Laws of 1934, Ch. 873, was duly enacted and the respondent respectfully refers this court thereto for the terms and the meaning thereof.

For a separate answer to the petition herein respondent alleges:

4. That between December 10, 1934 and December 31, 1935 petitioner purchased at retail in the City of New York, for purposes other than resale, tangible personal property consisting of fuel oil upon the receipts from which it failed and [fol. 29] refused to pay the tax due by Local Law #20 of 1934 as amended.

5. That said fuel oil was owned by petitioner and situated in the City of New York during the period from January 1, 1935 to December 31, 1935 and the petitioner did not pay the tax thereon prescribed by Local Law #13 of 1935, although said tax was due and owing thereunder.

6. That thereafter, as a result of hearings held at the request of petitioner and at which evidence was taken pursuant to the statutory direction, the Comptroller determined that there was due and owing from the petitioner by reason of the foregoing taxes in the sum of $26,955.70 (inclusive of interest and/or penalties).

7. That hereto annexed and made a part of this answer is a duly certified transcript of the record of the proceedings before the Comptroller mentioned in the petition herein and subject to review or consideration in this proceeding.

8. That the pertinent and material facts upon which the determination of the Comptroller was based are the presumptions set forth in the aforesaid Local Laws and such facts as are embodied in the said certified transcript of the record of the proceedings; and the determination of the Comptroller which is complained of is in conformity with the law and the facts and is sustained by the record.

9. That this proceeding necessarily involves the determination of issues that fall within subdivisions 6 and 7 of § 1296 [fol. 30] of the Civil Practice Act and as such is properly transferable for disposition to a term of the Appellate Division, First Department.

Wherefore, respondent prays that the Court at Special Term make an order transferring the within proceeding for disposition to a term of the Appellate Division, First Department; and for a final order dismissing the proceeding

herein on the merits, and for such other, further and different relief as to the Court may seem good, together with costs to the respondent.

Dated, New York, December 11, 1937.

Paul Windels, Corporation Counsel, Attorney for Respondent, Municipal Building, New York City, New York.

(Sworn to by Thomas P. Smith, Jr., as Deputy and Acting Comptroller of the City of New York, December 11, 1937).

[fol. 31] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Same Title]

COMPTROLLER'S RETURN TO PETITION

Frank J. Taylor, Comptroller of the City of New York, does hereby certify that the following is a true and correct transcript of the record of proceedings subject to review or consideration in this proceeding, consisting of all and singular his rulings and assessment in the premises, together with his proceedings, decisions and actions in the premises of all and singular, the evidence, documents, records and all other papers before him or which were submitted to him concerning the taxation of the petitioner on receipts from sales on the amount of its purchases of tangible property during the period from December 10, 1934 to December 31, 1935, pursuant to New York City Local Law #20 of 1934, as amended by the New York City Local Law #24 of 1934 and pursuant to New York City Local Law #13 of 1935:

1. Notice of assessment of deficiency tax dated May 4, 1936, in the amount of $25,534.50, with interest and/or penalties in the amount of $2,905.18 for the period from December 10, 1934 to December 31, 1935, pursuant to Local Law #20 of 1934 as amended by Local Law #24 of 1934, including exhibits and schedules attached thereto.

2. Protest of the petitioner by its attorneys against the aforesaid deficiency tax and application for a hearing, dated June 3, 1936.

[fol. 32] 3. Letter, dated June 22, 1936, from Milton Solomon, Deputy Comptroller, to petitioner's attorneys fixing a date for a hearing.

4. Letter, dated May 20, 1937, from petitioner's attorneys to Milton Solomon, Deputy Comptroller, suggesting that certain adjustments be made.

5. Determination of the Comptroller dated on or about May 27, 1937, that there was due and payable to the City of New York from the petitioner herein a deficiency of $29,924.36 (comprising tax, interest and/or penalties), for the period from December 10, 1934 to December 31, 1935, pursuant to Local Law #20 of 1934 as amended; together with petitioner's agreement that there was due thereon the sum of $4,005.36, which sum petitioner agreed to pay.

6. Minutes of testimony taken at hearings held on June 10, 1937, June 21, 1937, June 25, 1937 and June 28, 1937 at 50 Lafayette Street, New York City, together with the exhibits therein referred to.

7. Determination by the Comptroller, consisting of a notice in writing, signed by Milton Solomon, Deputy Comptroller, dated October 25, 1937 to the effect that for the period from December 10, 1934 to December 31, 1935, there was due and owing from petitioner taxes in the sum of $20,738.22 (with interest and/or penalties of $6,217.48).

8. Letter from petitioner's attorneys to Milton Solomon, Deputy Comptroller, dated October 26th, 1937, enclosing [fol. 33] check for $26,955.70 for taxes and interest and/or penalties due according to the aforesaid determination.

In Witness Whereof, the Comptroller of the City of New York has hereunto set his hand on this 11th day of December, 1937.

Thomas P. Smith, Jr., Deputy and Acting Comptroller of the City of New York.

EXHIBIT 1, ANNEXED TO RETURN TO PETITION

This exhibit is printed as "Exhibit A" annexed to Petition at side folio 15 herein.

EXHIBIT 2, ANNEXED TO RETURN TO PETITION

This exhibit is printed as "Exhibit B" annexed to Petition at side folio 22 herein.

[fol. 34] EXHIBIT 3, ANNEXED TO RETURN TO PETITION

(Letterhead of)

The City of New York,

Department of Finance

June 22, 1936.

Haight, Griffin, Deming & Gardner, Esqs., 80 Broad Street, New York City.

Attention: Mr. Herbert K. Stockton

Re Compagnie Generale Transatlantique, 610 Fifth Avenue, New York, N. Y. Your file No. 522-229

DEAR SIR:

In answer to your letter of June 3, 1936 please be advised that a hearing will be held in Room 839 at 50 Lafayette Street, Borough of Manhattan, on July 17, 1936 at 2:00 P. M., with respect to the determination of the deficiency tax assessed pursuant to the provisions of Local Law No. 20 of 1934, as amended.

You are accordingly advised to appear at the time and place hereinabove designated. A power of attorney is required in all cases where the taxpayer is represented by another person acting in his behalf.

Yours very truly, Milton Solomon, Deputy Comptroller. G.

DW.

[fol. 35] EXHIBIT 4, ANNEXED TO RETURN TO PETITION

(Letterhead of)

Haight, Griffin, Deming & Gardner,
80 Broad Street,
New York

May 20, 1937.

Milton Solomon, Esq., Deputy Comptroller, 50 Lafayette Street, New York.

Attention Mr. Louis Goodgold

French Line—City Sales Tax
Our file 522-229

DEAR SIR:

Acknowledging postponement notice scheduling tax deficiency formal hearing in this matter for June 3, 1937, at

10 o'clock, we understand that this hearing may, if the facts developed are mutually acceptable, make the record for a test in the Appellate Courts of our client's contention that the sales under the fuel oil contract between the Standard Oil Company of New Jersey and the French Line for bunkering the latter's vessels at the New York City piers are exempt because involving interstate commerce, and we will make our preparations for the hearing accordingly.

It is desirable, we submit, for both the City and the French Line that the record be simplified as far as possible for the sake of clarity and economy.

At the informal hearings just concluded by Mr. Tessler it was agreed that of the items taxed (excluding fuel oil) [fol. 36] totalling $239,776.96, $146,610.57 was agreed to be taxable, $35,845.28 was agreed to be exempt, and $57,321.11 remains in dispute. Of this $57,321.11 in dispute, $4,276.72 is for rope, $29,093.52 for office supplies, $5,480.30 for paints, $18,470.57 for the printed matter from the home office (duty and approximate value).

As to the items for rope and paints, the defendant claims that some of these were exempt by being delivered at Havre to the agency there, though not manifested nor covered by bill of lading.

As to office supplies, the defendant claims that a certain amount were bought for distribution to branch agencies in the United States, exemption for which is agreed to in principle.

As to printed matter from the home office, the defendant claims that this should not be taxed on the landed value plus duty, but at the purchase or cost price in France, the material having been supplied by the home office for the New York and other agencies. It will be observed that the total of these items in dispute is $57,321.11.

The amount of tax figured by Mr. Tessler, taking these disputed items in favor of the City, is $4,110.96, and the interest penalties thereon $1,012.73, or a total of $5,123.69.

To clear the record of these small items, especially as it will involve some work and expense to prove our client's contentions with regard thereto, we offer on behalf of our client to pay to the City now a flat sum of say $4,000 in compromise of the $5,123.69.

We trust that this adjustment can be made so as to avoid the expense of trying out these small matters, but partic- [fol. 37] ularly so as to simplify the record for the proposed

test case on the Standard Oil Company of New Jersey sales.

Very truly yours, Haight, Griffin, Deming & Gardner,
by Herbert K. Stockton.

HKS/M.

EXHIBIT 5, ANNEXED TO RETURN TO PETITION

This exhibit is printed as "Exhibit C" annexed to Petition at side folio 23 herein.

[fol. 38] EXHIBIT 6, ANNEXED TO RETURN TO PETITION

MINUTES OF HEARING

Department of Finance, City of New York,

Emergency Revenue Division,

#50 Lafayette Street,

New York, N. Y.

June 10, 1937, at 10:00 A. M.

Presiding: Louis Goodgold.

In the Matter of COMPAGNIE GENERALE TRANSATLANTIQUE, 610 Fifth Avenue, New York, N. Y.

Reg. # Misc.

Attorney for Taxpayer: Haight, Griffin, Deming & Gardner, 80 Broad Street, New York City, by Herbert K. Stockton, Esq., Bernard D. Atwood, Esq., George De Forest Lord, Esq., of Counsel.

Appearances for Taxpayer: Oscar R. Cauchois, 458 West 144th Street, New York City, Fred W. Ficken, 430 East 86th Street, New York City.

Appearances for Comptroller: Robert G. Burke, Esq., Asst. Corporation Counsel, M. J. Feingold, Accountant.

Naomi G. Saper, Reporter.

[fol. 39] Mr. Goodgold: This is a hearing under Local Law No. 20 of 1934, as amended, imposing a tax of $25,534.50 exclusive of interest and penalties for the period from December 10, 1934 to December 31, 1935. The tax is based

upon purchases made by the Compagnie Generale Transatlantique, upon which purchases said company failed to pay a sales tax in accordance with law. The purchases consist principally of fuel oil for use on the company's steamships and miscellaneous other items. The taxpayer has paid to the Comptroller the tax on all of its purchases except fuel oil, and it is the purchase of fuel oil which is now the subject of this hearing.

Mr. Stockton: And the net amount involved of tax deficiency claimed for the purchase of fuel oil is $20,738.22, exclusive of interest and penalties.

Oscar R. Cauchois, 458 West 144th Street, New York City, a witness called on behalf of the taxpayer, being duly sworn, testifies as follows:

Direct examination.

By Mr. Stockton:

Q. Mr. Cauchois, you were previously actively in the service of the French Line, were you not?

A. Yes.

Mr. Goodgold: When you mention the French Line, Mr. Counsellor, will you please designate for the record——

Mr. Stockton: Yes, I will bring it out.

Q. And the French Line is the same for the purpose of [fol. 40] this proceeding as the Compagnie Generale Transatlantique?

A. That is their official name, and known as the French Line.

Mr. Stockton: Could I stipulate on the record that the French Line referred to in their testimony means the taxpayer in this proceeding?

Mr. Goodgold: It is so agreed.

Q. And how long did you work for the French Line, Mr. Cauchois?

A. Well, I was active for fifty-eight years.

Q. When did you start?

A. October, 1875.

Q. In what capacity?

A. Well, I was attached to the Freight Department at that time.

Q. In the New York office?

A. New York office.

Q. You were born in New York?

A. Yes.

Q. And will you tell us briefly of your career with the French Line and the various capacities you filled?

A. Well, I went in the Freight Department, and then became the Freight Traffic Manager, Assistant Agent, and then I became the advisory——

Mr. Goodgold: What is that, advisory?

Witness: Advisory director, and finally retired January 1, 1934, as honorary manager.

Q. And you were advisory director for about how long?

Mr. Goodgold: May I interrupt it at this stage of the proceeding?

By Mr. Goodgold:

Q. Did I understand you to say you have retired?

A. From the active service.

[fol. 41] Q. From the employ of the company on January 1, 1934?

A. On the first day of January, 1934, I was retired; I retired from the company's active service.

Q. Were you employed by the company after that date in any capacity?

A. Was I? I am always attached; I am honorary director, I have been attached and am still attached.

Q. As director only?

A. Just as honorary director only, following the affairs of the company, but I am not taking any active interest in any particular service.

By Mr. Stockton:

Q. But in the capacity of honorary director, you are still connected with the Line, are you not?

A. Absolutely, yes.

Q. And in such capacity, have you conferred with the officials of the Line here since you became the honorary manager?

A. Oh, yes, regularly, all the time.

Q. So that you are familiar with the affairs of the Line since you became honorary manager?

A. Yes, except details of the various departments, familiar with everything else.

Q. Who was the general manager of the Line in New York when you became honorary manager?

A. Morin de Linclays.

Q. And he is the present general manager?

A. Yes, sir.

Q. And his assistant is Jean Artur?

A. Jean Artur.

Q. And was in January, 1934, at the time you became honorary manager?

A. Yes.

Q. About when did you become advisory director?

A. 1921.

[fol. 42] Q. And before that you said you had been traffic manager?

A. Traffic manager.

Mr. Goodgold: Before that he said he was assistant agent.

Witness: Assistant agent.

By Mr. Goodgold:

Q. When did you become assistant agent?

A. Oh, about 1890, or 18—something like that, always represented the company in the absence of the general agent on his vacations or whatever——

Q. When did you become traffic manager?

A. Oh, I must have become traffic manager about '85, between '85 and '88; I don't remember the exact date.

Q. As assistant agent and traffic manager, did you have to do with the purchase of bunker fuel oil for the steamers of the line?

A. Always since the steamers began oil business.

Mr. Goodgold: Mr. Counsellor, I don't see the relevancy of all this questioning relating to a period way back in 1885 and up to January 1, 1934. The assessment which is the subject of this proceeding is for the period beginning with December 10, 1934, to December 31, 1935; I can't see what relevancy the questioning you are now proceeding with has to do with the period December 10, 1934 to December 31, 1935.

Mr. Stockton: It will appear, Mr. Goodgold, in the further questioning. The relevancy, I may say, is to show the familiarity of Mr. Cauchois with the contracts in this case, [fol. 43] which were made long before 1934. They date back to, I think the first contract, some of the terms of which were continued, go back to 1927, or 1928, and it is necessary to show that this witness had an entire familiarity with the making of those contracts and their effect.

Mr. Goodgold: Well, I think all you have to show is to show the present contract and tie it up with the preceding contracts.

Mr. Stockton: Well I will be glad to keep it in mind. At the same time, I have an idea of our side of the case, which, with your permission, I will continue to develop. That is, I think there are various questions involved in this case which require a certain amount of what I might call background.

Mr. Goodgold: I will permit you to proceed, and stop it if I find it isn't relevant.

Mr. Stockton: That is perfectly satisfactory, except that I don't agree in advance to any ruling you may make as to its relevancy, which I suppose in the last analysis is the expression of the court.

Mr. Goodgold: You may always have your exception.

By Mr. Stockton:

Q. When did the steamers begin to use fuel oil?

A. Oh, I think about 1920; our Line was the first to use fuel oil, wasn't it? In 1920 or '21, we changed from—it was right after the war when we took the France—to oil burners. [fol. 44] Q. And did you negotiate the contract for fuel oil for the France, at that time?

A. Oh, yes, all the fuel oil contracts were made by me.

Q. Who did you contract to buy from?

A. Standard Oil Company of New Jersey.

Q. And has the company bought from the Standard Oil of New Jersey ever since that time?

A. Exclusively.

Q. When you negotiated that contract, did you ascertain the situation of the Standard Oil of New Jersey with regard to their capacity to make deliveries and where deliveries would be made from?

Mr. Burke: Just a moment, before you answer that, sir, the terms of delivery are no doubt in the contract which was

finally agreed upon between the parties, are they not? And what the negotiations leading up to the contract may have been are in the contract; I think that would be the best evidence, on the question of delivery.

Mr. Stockton: There may be also the question of the understanding of the parties, as affecting some of the issues in this case.

Mr. Burke: Except that some of the understandings have all been written into the contract, has it not?

Mr. Stockton: No.

Mr. Burke: It has not?

Mr. Stockton: Not necessarily, and some of it has not.

Mr. Burke: I do object to the testimony of the negotiations leading up to the contract, so far as the question of [fol. 45] delivery is concerned, because I feel that that has been merged into the written form of contract.

By Mr. Stockton:

Q. When you first decided to buy bunker fuel oil from the Standard Oil Company of New Jersey, did you ascertain what the physical situation of their plant was?

A. Certainly I did.

Q. What did you do in that regard?

A. I found out where their plant was located, and what the means of delivery were.

Q. Where did you find their plant to be located?

A. In New Jersey, Bayonne.

Mr. Goodgold: What time are you talking about?

Q. What time are you talking about?

A. Talking about the very first contract I made with them, and continued along——

Mr. Goodgold: You are talking about the year 1920?

Q. 1921, I think?

A. 1920, 1921.

By Mr. Goodgold:

Q. Then all the testimony you are now giving refers to the year 1921?

A. No, it doesn't.

Q. When you first entered into the original contract?

A. All the testimony I have given as I understand it refers to the period from which I began contracting with

Standard Oil Company up to the termination of the contracts.

Q. Did you say before that the first contract was entered into in 1921?

A. Yes.

[fol. 46] Q. That all contracts subsequent to that date were a continuation of the first contract?

A. I wouldn't say a continuation of the first contract; the terms were changed, but it was predicated on what I knew of the Standard Oil Company at the time I originally contracted with them, confirmed in my mind that they have the same situation as regards conditions, and so forth.

Mr. Goodgold: Proceed.

By Mr. Stockton:

Q. Did you go over to the Standard Oil plant at that time?

A. I did, a couple of times.

Q. And did you inspect the docks and so forth?

A. Yes, to find whether it was possible to dock steamers there and take their fuel oil, draft of water and so forth and estimating from the draft about what size vessels I could send there; I had vessels, many vessels, and I had several freight steamers with a lesser draft, and when they had a very much lesser draft, I sent them over light.

Q. So that your understanding was that you could put ships over there if they were small enough and take oil over from the Standard Oil Company in New Jersey?

A. Yes, any vessel I could lighten up to 27, 28 feet; 30 feet was the maximum that they could take.

Q. And as to the ships that you could not send over to take oil from the plant in New Jersey, how were you to get the oil from the Standard Oil Company of New Jersey for those ships?

A. I would have to barge it over from the plant to the ship.

[fol. 47] Q. Now the French Line piers at that time were where?

A. Pier 57, Pier 57 North River.

Mr. Goodgold: At that time, you mean 1921?

Mr. Stockton: 1921.

Witness: Yes, sir.

Q. Pier 57 North River, New York?

A. Yes, sir, West 15th Street.

Q. West 15th Street, Borough of Manhattan?

A. Yes; I will qualify that by saying that at times we had a freight pier, where we would dock our freight steamers, foot of 50th Street, French steamers.

Q. Manhattan?

A. Yes.

Q. Now the pier has been moved from Pier—the French Line was moved from Pier 57 to 88?

A. We gave up Pier 57 to the City and moved to the new pier 88.

Q. When was that taken over?

A. Oh, about two years ago, June I think; it must have been in 1935.

Q. That pier is about at the foot of 49th Street, Borough of Manhattan, is it not?

A. Well, we call it 50th Street.

Q. 50th Street? In the Borough of Manhattan?

A. Yes.

Q. That pier is the only pier that the French Line has?

A. Yes.

Q. Before that the only pier that they had was Pier 57 and the Freight pier that you speak of?

A. For docking up there, when we couldn't put up there, we put them up there as an auxiliary.

Q. And that was what number, that was at the foot of 50th Street?

[fol. 48] A. That was practically where we are now, 50th Street, the City tore down those old piers there.

Q. And are those the only piers the French Line has put steamers at since you were connected with it?

A. No, during the War we had to get piers all over for our freight ships.

Q. That was a different question, at the time of the War.

A. Before we had oil burners.

Q. Apart from that, those were the only piers?

A. At which our ships could dock.

Q. Mr. Cauchois, I show you a document and ask you what that is?

A. It is a contract for the fuel oil during the year 1928, in which we stipulated the maximum——

Mr. Goodgold: Just tell us what that is.

Mr. Stockton: That is a contract.

By Mr. Goodgold:

Q. Contract with whom?

A. Standard Oil of New Jersey.

Q. With whom?

A. And the Compagnie—French Line, I will abbreviate by saying French Line.

By Mr. Stockton:

Q. And that was the contract for the supply of fuel oil for your steamers there named for the year 1928?

A. Yes, all the steamers, postal steamers, that were in service at that time.

Mr. Burke: The contract will speak for itself, I think, Mr. Stockton.

Mr. Stockton: Yes, I offer that in evidence.

Mr. Burke: Where is there any acceptance by the French Line of the terms of this agreement to supply fuel oil.

[fol. 49] Mr. Stockton: Let's see that.

Mr. Burke: It seems to be an offer without any acceptance by the purchaser of the fuel oil.

Mr. Stockton: The next letter.

Mr. Burke: Is that part of the contract?

Mr. Stockton: Well, you can see that it is simply an acceptance; I don't want to encumber the record, acceptance in terms so that there was no modification, and in order to simplify this record, I should prefer to prove the Standard Oil letter with reference to which Mr. Cauchois testified, as to its acceptance, so that we do not get an unnecessary number of exhibits here.

Mr. Burke: I think it would be essential in this case, if we are talking about the contract between two companies, that we have both the offer and the acceptance, particularly if we have the contract in the record.

Mr. Stockton: I am perfectly willing to do that.

Mr. Burke: May I ask before accepting this exhibit whether or not the figures in the upper left hand corner in crayon, are a part of this letter, and what that represents?

Mr. Stockton: That is not a part of the letter, but is a memorandum noted thereon by Mr. Cauchois, if I am not mistaken; is that right, Mr. Cauchois?

Witness: That was a memorandum put on for my reference, for my files that this letter is a revision of my contract of 1928.

[fol. 50] Mr. Burke: I see.

Witness: Refers to that contract, but that is only my memorandum.

Mr. Burke: There was a previous contract, was there not?

Mr. Stockton: A great many previous contracts, but they had nothing to do with this case.

Mr. Burke: I have no objection.

Mr. Goodgold: Will you offer that for identification first?

Mr. Stockton: No, I will offer that in evidence, Mr. Goodgold, it has been identified by Mr. Cauchois.

Mr. Goodgold: No objection.

(Received and marked Taxpayer's Exhibit No. 1 in Evidence.)

Mr. Stockton: I understand that it is agreeable to the City, as it is to us, that photostats of these letters be substituted for use, for all letters in this case. In place of this exhibit I will therefore offer a photostatic copy of Taxpayer's Exhibit No. 1, and ask that that be marked Taxpayer's Exhibit No. 1.

Mr. Goodgold: Substituted in lieu thereof.

(Copy received and marked Taxpayer's Exhibit No. 1 in Evidence.)

By Mr. Stockton:

Q. I show you another paper, Mr. Cauchois, and ask you what that is?

A. That was an acknowledgment of the Standard Oil letter of October 14, 1928.

[fol. 51] Q. That signature at the bottom of this paper is your signature, is it not, Mr. Cauchois?

A. Yes.

Mr. Stockton: I offer that in evidence, as Taxpayer's Exhibit No. 2.

Mr. Burke: No objection.

Mr. Goodgold: Taxpayer's Exhibit No. 2 in Evidence.

(Letter received and marked Taxpayer's Exhibit No. 2 in Evidence.)

Mr. Goodgold: With respect to the exhibits already in evidence, I will receive them in evidence subject to their

being tied up with the contracts for the transactions during the period December 10, 1934 to December 31, 1935; if these contracts are not tied up with these transactions, I will have to strike them out.

Mr. Stockton: I will say in answer to that that these tie themselves up by their own terms and I am not anxious to have them in except to show the complete picture.

By Mr. Stockton:

Q. I show you a letter and ask you whether you received that?

A. Yes.

Q. On or about its date, October 19, 1927?

A. Yes.

Q. From the Standard Oil Company?

A. Standard Oil Company of New Jersey.

Mr. Goodgold: Counsellor, will the witness merely identify the document, and then offer it for identification, and after you offer it for identification, then you may ask [fol. 52] questions and then offer the document in evidence.

Mr. Stockton: I offer that in evidence as Taxpayer's Exhibit 3.

Mr. Goodgold: No objection, Taxpayer's Exhibit No. 3 in Evidence.

(Letter received and marked Taxpayer's Exhibit No. 3 in Evidence.)

Q. I show you a letter dated October 19, 1927 and ask you whether you signed and sent that to the Standard Oil Company?

A. I did.

Mr. Stockton: I offer that in evidence.

Mr. Burke: No objection.

Mr. Goodgold: Taxpayer's Exhibit 4.

(Letter received and marked Taxpayer's Exhibit 4 in Evidence.)

Q. That letter you sent to the Standard Oil Company of New Jersey?

A. Yes.

Q. I show you a letter dated November 9, 1927 and ask you if you received that from the Standard Oil Company of New Jersey?

A. I did.

Mr. Stockton: I offer that in evidence.
Mr. Burke: No objection.
Mr. Goodgold: Taxpayer's Exhibit 5 in Evidence.

(Letter received and marked Taxpayer's Exhibit No. 5 in Evidence.)

Q. I show you letter, Mr. Cauchois, dated November 9, 1927, addressed to The Standard Oil Company of New Jersey; was that signed by you and sent to them.
A. Yes.
Q. On or about its date?
A. November 9, 1927.

[fol. 53] Mr. Stockton: I offer that in evidence.
Mr. Burke: No objection.
Mr. Goodgold: Taxpayer's Exhibit 6 in Evidence.

(Received and marked Taxpayer's Exhibit No. 6 in Evidence.)

Q. I show you a letter dated January 5, 1928, and ask you if you received that from the Standard Oil Company of New Jersey, and whether you signed that on the left hand side?
A. I did, I received it.
Q. And that is your signature?
A. My signature.

Mr. Goodgold: Do you offer that in evidence?
Mr. Stockton: I will offer this copy, and I will exhibit the original.
Mr. Goodgold: No objection, Taxpayer's Exhibit No. 7 in Evidence.

(Received and marked Taxpayer's Exhibit No. 7 in Evidence.)

Q. I show you a two-page letter, Mr. Cauchois, and ask you if you received that on or about its date, October 14, 1929, from the Standard Oil Company of New Jersey?
A. I did.

Mr. Stockton: I offer those two pages in evidence.
Mr. Goodgold: Are you offering this letter as it appears now or as it appeared before the "x" marks?
Mr. Stockton: As it appears, with the "x" marks and everything on it.
Mr. Burke: What do these "x" marks mean?

[fol. 54] Mr. Stockton: I will have them explained by the witness in a minute.

Mr. Burke: As it stands now, the letter means nothing because it is all stricken out.

Mr. Stockton: I will have them explained before offering it.

Mr. Goodgold: No objection.

(Letter received and marked Taxpayer's Exhibit No. 8 in Evidence, two pages.)

Q. Mr. Cauchois, I show you Taxpayer's Exhibit 8 in Evidence, two pages, and ask you what the marks are on that letter? The red marks in red pencil and in black pencil?

A. I designated that as an offer from the Standard Oil Company, which I accepted, referred to in their new form, November 19, 1929.

By Mr. Burke:

Q. Was that notation merely for your own information on the letter?

A. Yes, sir.

Q. There was nothing made to the Standard Oil Company of New Jersey, was there, in that form, or was an additional letter written by you acknowledging that offer?

A. I don't—that was a letter written by the Standard Oil to me.

Q. Yes, but your markings on there were only for your personal information, and the terms of the letter were satisfactory to you?

A. For my file; in case inspectors came over from Europe, they wanted to know if that was final, they would see there that they had to refer to the new form.

By Mr. Goodgold:

Q. What do those "x" markings mean?

A. What is that?

[fol. 55] Q. What do those "x" markings mean?

A. What do they mean; it means that this letter is not modified but is substantiated by a letter in more detail of November 19. It is the acknowledgment of the agreement.

By Mr. Stockton:

Q. In other words, this exhibit was an offer and was accepted with some modifications?

A. I can't recollect what the modifications are, but whatever the modifications are, the letter of November 19th specified.

Q. But those slight changes were put in the letter of November 19th?

A. Exactly.

Q. I now show you this letter of November 15, 1929, and ask you if you wrote that and sent it to the Standard Oil Company of New Jersey?

A. I did.

Mr. Stockton: I now offer that in evidence.

Mr. Burke: No objection.

(Letter received in evidence and marked Taxpayer's Exhibit No. 9; Letter of November 19th, Standard Oil Company to Mr. Cauchois, received in evidence and marked Taxpayer's Exhibit No. 10 in Evidence [2 pages] without objection.)

Q. Mr. Cauchois, I show you a photostat and ask you whether that is a photostat of a letter that you received from the Standard Oil Company on or about May 10, 1932?

A. Yes, it is.

Q. You have seen the original of that letter have you not?

A. Yes.

Mr. Stockton: I will state on the record that the original is in my office and by error was not included in the file [fol. 56] brought up here, but was taken out to be photostated and I will produce the original of the letter when I get back to the office.

Q. I show you Mr. Cauchois, a letter dated May 10, 1932, and ask you if you received a letter like that from the Standard Oil Company of New Jersey, on or about that date?

A. That is the letter I received.

Q. And did you make notes on that?

A. Those are my notations.

Q. Made at that time?

A. At the time of the reception of the letter.

Mr. Goodgold: Reception of what letter?

Mr. Stockton: Of the letter referred to.

Witness: The letter referred to.

Mr. Stockton: Now I will ask to have that marked for identification.

Witness: That is the original——

Mr. Burke: Where is the original of this letter? This is a carbon copy first of all, and it bears a stamped signature.

Witness: The Standard Oil sent it in that way; sometimes they sent the original and a copy with it, and sometimes they sent a copy that is the one I received.

Q. And that is the one you gave back to the Standard Oil Company, is it not?

A. I can't say that I gave it back to them, because I have no recollection that I gave it back to them.

Q. Well, this is the copy that was produced from their files; does it refresh your recollection that it was the copy you sent back to them?

[fol. 57] A. Oh, that was the copy sent back to them if it comes from their file.

Mr. Burke: I move to strike out all about the original letter; first of all, it is not the original letter.

Mr. Goodgold: An examination of that letter clearly shows that it is a carbon copy.

Mr. Stockton: It is a carbon copy; this carbon copy is not a signature copy.

Mr. Goodgold: There is no signature to that letter; it is a stamped letter.

Mr. Stockton: The signature of Mr. Cauchois' name is on the letter.

Mr. Goodgold: The letter has not been written by Mr. Cauchois; it was written by a man by the name of Mr. Mellar.

Mr. Stockton: In order to show exactly what happened, I will ask leave to withdraw this witness for a few minutes, and put on another witness. I will ask to examine Mr. Ficken.

Mr. Goodgold: The Corporation Counsel has moved to strike out the introduction.

Mr. Burke: I moved to strike out the testimony.

Mr. Goodgold: Strike out the testimony.

Mr. Stockton: All right; strike out the testimony; I will now withdraw Mr. Cauchois from the stand, and ask to have Mr. Ficken sworn.

Mr. Goodgold: For what purpose?

Mr. Stockton: I will show you as I proceed with the examination.

Mr. Goodgold: Don't you think you can do that later, after we have had an opportunity to cross-examine the witness?

[fol. 58] Mr. Stockton: No, sir, it is extremely regular; I simply call another man to identify this document and then we will withdraw him and you can examine as you desire.

(Mr. Cauchois was withdrawn at this point.)

Fred W. Ficken, 430 East 86th Street, New York City, called as a witness on behalf of the taxpayer, being duly sworn, testifies as follows:

Direct examination.

By Mr. Stockton:

Q. Mr. Ficken, what is your employment?

A. I am assistant manager of the Fuel Oil Department of the Standard Oil Company of New Jersey.

Q. You have heard Mr. Cauchois testify as to the contracts made between the Standard Oil Company of New Jersey and the French Line?

A. I have.

Q. And with regard to those contracts——

Mr. Goodgold: Just a moment, strike that out.

Mr. Burke: Qualify this man, whether he is familar with those contracts, knows anything about them.

Mr. Stockton: All right.

Q. Are you familiar with those contracts?

A. Each and every one of them.

Mr. Goodgold: Mr. Stockton, I will have to strike out all [fol. 59] your questioning thus far; you will have to first qualify the witness in every respect to show that he is competent to give the testimony which you are about to ask him to give. Unless he qualifies I will have to exclude all the testimony.

Mr. Stockton: I was just in the process of qualifying him by showing that he was the man who made the contracts.

Mr. Goodgold: Let us qualify him now.

By Mr. Stockton:

Q. Mr. Ficken, how old are you?

A. Forty-five years of age.

Q. And how long have you been employed by the Standard Oil Company of New Jersey?

A. Twenty-eight years.

Q. And in what capacity are you now employed by them?

A. Assistant manager of the Fuel Oil Department.

Q. And in such capacity, what are your duties in general?

A. Negotiate fuel oil contracts with the marine industry.

Q. And are the records in your office under your charge and supervision?

A. Yes.

Q. I mean, your general charge?

A. Yes.

Q. Now did you have any dealings with the French Line with regard to fuel oil contracts?

A. Many.

Mr. Goodgold: Mr. Stockton, I am sorry but you have not yet qualified that witness to testify with respect to that letter. He merely stated that he is acting now as assistant manager of the Fuel Oil Division. This is the year 1937. I believe that letter is dated way back in 1932.

Mr. Stockton: All right.

[fol. 60] Q. How long have you been assistant manager of the Fuel Oil Department of the Standard Oil Company of New Jersey?

A. Since 1926.

Q. And is it part of your duties as such assistant manager to negotiate fuel oil contracts?

A. That is principally my duty.

Q. And have you been doing that for the period since you have become assistant manager?

A. And before.

Q. Who is A. L. Mellar?

A. Mr. A. L. Mellar was, during the period of 1929 to and including the middle of 1933, the manager of the Fuel Oil Department.

Q. And did you yourself negotiate with the French Line the contracts for their fuel oil for the years 1928—

Mr. Burke: Just a moment, what do you mean by "negotiate contracts"?

By Mr. Stockton:

Q. What did you have to do with the Fuel Oil contracts for the French Line in the year 1927?

A. I—nothing directly except to see that they were concluded and the deliveries were made and that—discuss with the French Line matters of policy.

Q. Did you negotiate the terms of those contracts with the French Line?

A. I did not.

Q. Who did that?

A. In 1928?

Q. In 1927?

A. Mr. G. H. Michler.

Q. And you were at that time assistant to Mr. Michler?

A. Yes.

Q. Now does the same thing hold true with regard to the year 1928?

A. Yes.

Q. Now did you have anything to do with the carrying out of these contracts?

A. Yes.

[fol. 61] Q. What in general?

A. With respect to discussing changes in prices as affecting the contract.

Q. In the year 1929, who was head of your Department?

A. Mr. A. L. Mellar.

Q. And you still had this position of assistant manager of the Fuel Oil—of the Sales Department of the Fuel Oil Division of the Standard Oil Company of New Jersey?

A. That is correct.

Q. In that connection were you familiar with the making of this contract of November 19, 1929, which is marked Taxpayer's Exhibit 10?

A. I was familiar with the making of that contract.

Q. And you recall that there was a provision in that contract that in the event of any change in price, notice thereof shall be promptly given to the Compagnie Generale Transatlantique by mailing same to them at 19 State Street, New York, N. Y.?

A. I do.

Mr. Burke: Just a moment, didn't this witness just testify that he had nothing to do with the preparation of contracts, that all he did was follow them up?

Mr. Stockton: In 1927 and 1928.

Witness: Yes, sir.

Q. And in 1929 was the same thing true?

A. That is right.

Mr. Burke: Then I move to strike out the testimony.

Mr. Stockton: Just a moment, he said that he followed them up.

Mr. Ficken: My duties are, as price changes might present themselves, it would be my duty to perhaps visit Mr. [fol. 62] Artur of the French Line and say, "Mr. Artur, our price is to be advanced tomorrow", or "our price is to be lowered tomorrow". I might call up or visit, principally visit, a representative of any of several steamship companies and discuss with them the matter of price advancing or declining.

By Mr. Burke:

Q. Do you as a matter of duty notify the steamship companies or the others when prices change?

A. Yes, sir, that is my duty under the contract.

Q. Whether or not you have a contract with the company? Do you always notify them when the prices change, when they have no contract with you?

A. No.

Mr. Goodgold: I think we are going far afield, counsellor. The purpose of this witness' testimony was to establish the authenticity of this letter to prove that it was original. All of the testimony you have given thus far has no relation to this letter.

Mr. Stockton: May I suggest that you are objecting first to my putting in letters and then objecting to my laying a foundation for the introduction of the letters?

Mr. Goodgold: I have no objection to whatever foundation you lay which will tie up to this letter.

Mr. Stockton: All right, I will tie it up to this letter.

[fol. 63] By Mr. Stockton:

Q. The price changes during the continuation of this contract, Mr. Ficken, you did say you follow up with the lines and discuss with the representatives of the lines?

A. That is correct.

Q. And do you sometimes give notice of change of prices over the telephone?

A. Yes, which are subsequently followed by a written notice.

Q. I show you a file which you have produced and handed to me, headed "French Line Contract, Compagnie Generale Transatlantique", is that one of your files from the files of your office?

A. Yes, it is, and was a letter that was dictated by me.

Q. One minute, I call your attention to a letter in that file, dated May 10, 1932, and ask you what you know about that letter?

A. The original of this letter——

Mr. Burke: Wait a minute, that letter has not been introduced in evidence; have it marked for identification.

Mr. Stockton: Have it marked for identification.

(Received and marked Taxpayer's Exhibit No. 11 for Identification.)

Q. Now, did you say that you dictated that letter Mr. Ficken?

A. I would say so, this is my initials on the letter.

Q. Does that refresh your recollection as to having dictated it?

A. I would say not particularly.

Q. But is that the regular course of business in your office for your initials to be put at the foot of a letter which you dictate?

A. That is right.

[fol. 64] By Mr. Burke:

Q. Do you sign letters that you dictate?

A. Yes.

Q. How did it happen that that one isn't signed by you?

A. I sign letters with the use of the Department head's signature.

Q. You don't sign your own name?

A. No.

By Mr. Goodgold:

Q. You haven't any signature on the letter at all as a matter of fact.

A. That is right.
Q. Where is the signature?
A. This is a carbon copy.

Mr. Goodgold: That is what I am trying to say, this is a carbon copy.
Mr. Stockton: You have more than that, Mr. Goodgold.

By Mr. Goodgold:

Q. Did you dictate that letter the way it appears there, with all the notations on the bottom?
A. No, I did not.

By Mr. Stockton:

Q. You said, Mr. Ficken, that you would sign these letters that you dictated in the name of the head of the department, is that right?
A. That is correct.
Q. That is, at this time in 1932, you would sign Mr. A. L. Mellar's name?
A. That is correct.
Q. Now when there was a change of price that way did you sometimes dictate these letters in duplicate and the original in carbon?
A. It was quite usual for me to do that.
Q. Why did you do that?
A. I would invariably visit the customer and speak with him and talk to him about the price change.

[fol. 65] By Mr. Goodgold:

Q. You don't mean that you dictated the letter in original and carbon; you don't mean that you dictated it twice?
A. No, I dictated a letter.
Q. You didn't dictate the letter in original and carbon?
A. I dictated this letter.

By Mr. Stockton:

Q. Did you dictate the letter and dictate to the stenographer that she should make a carbon of it?
A. Yes.

Mr. Goodgold: Thanks.
Mr. Stockton: I think that clears up that point.
Mr. Goodgold: Yes.

Q. And we will proceed with our explanation of what use you made of the original and carbon of the letter at this time?

A. It was quite usual that I would visit the customer and advise them of a contemplated price change and invariably with some customers, leave with them, a letter which had been written advising them of the price change and at times the original letter and a duplicate copy.

Q. And would you sometimes get either an acknowledgment or a notation on the duplicate that the customer had seen it and understood it?

A. Acknowledgments of such letters came to us in the form of original acknowledgement from the customers, and other times a duplicate copy would be returned to us with a notation of some kind.

Q. And was there any other contract with the French Line for fuel oil at this time, May 10, 1932, besides the con-[fol. 66] tract of November 19, 1929 which is in evidence as Taxpayer's Exhibit 10?

A. Well, Mr. Stockton, the contract of 1932, did you say?

Q. No, contract of 1929, Taxpayer's Exhibit 10, if you will wait a minute, I will show you that and you can refer to it?

A. Well, I recognize it here Mr. Stockton.

Q. There is a copy of it. In other words, at that time, 1932, was there any other contract to furnish fuel oil to the French Line besides this contract of November, 1929? I mean apart from the variations of price?

A. It occurs to me that there was no contract, I don't think so.

Q. Yes, there was?

A. In 1929 we had no other contract—during the calendar year 1929.

By Mr. Burke:

Q. What are you reading from now, Mr. Ficken?

A. I am not reading from anything.

Q. To refresh your recollection of the document?

A. I just wanted to refresh my recollection of the statement; I just wanted to make the statement with certainty that during the calendar year we had no other contracts, fuel oil contract, with the French Line.

Q. You had no other fuel oil contracts?

A. That is right.

Q. But you had contracts?

A. I am not certain of that, I don't believe we did; they might have been buying gasoline or lubricating oil or something like that.

By Mr. Stockton:

Q. Referring to Taxpayer's Exhibit 11 for Identification, you said that you dictated that; do you recall talking about [fol. 67] that with Mr. Cauchois?

A. I would not say definitely that I did, but I have every reason to believe that I did do it.

Mr. Burke: His answer is that he does not know.

Q. Don't you recall whether you talked to him personally about it or not? Did you convey to him in one way or other the original and carbon of that letter, and did you get one of them back?

A. I did.

Q. What did you get back?

A. The carbon copy of the letter.

Q. Referring to Taxpayer's Exhibit 11 for Identification?

A. That is right.

Q. That is what you got back?

A. Yes, sir.

Q. And when it came back to you, did it have marks on it?

A. Yes, it did.

Q. Did it have the marks on it that it now has, with the exception of the markings?

A. All but the notation on the left hand corner on the top of the page.

Q. What is the notation in the left hand corner?

A. That is a notation made by me.

Q. What does it consist of?

A. It is the initials of the man who handles actual price change notices and billing prices, that he should note this letter; he apparently has noted it because I recognize his initials.

Q. In other words, you are referring to the initials in the upper left hand corner which appear to be W. E. G. and immediately under that again W. E. G. in a different handwriting?

A. That is correct.

Q. But this writing at the bottom "Plus on Fuel Oil, 5¢ [fol. 68] F. A. S., ditto, Diesel, 6½, Noted, Cauchois", all that writing was on it when this came back to you?

A. Yes, it was.

Q. And did you consider that that constituted an acceptance by the customer of this price change?

Mr. Burke: I object to that question as calling for a conclusion on the part of the witness.

Mr. Stockton: I will withdraw the question.

Q. Was the return of this, Taxpayer's Exhibit 11 for Identification, to you, with the notations on it and Mr. Cauchois' signature in accordance with the regular course of your business?

A. That would—no, no, it was not necessary for Mr. Cauchois, to return that to us. That letter is merely advice to the French Line.

Mr. Goodgold: As a matter of law, I will state for the record that where the original letter is in existence, that is the best evidence.

Mr. Stockton: I will say that the evidence consists of the original and the carbon. The original letter will be introduced; I am now talking about the carbon. This is a matter between the parties.

Mr. Goodgold: As I stated before, we will have it marked for identification subject to the introduction of the original letter.

Mr. Stockton: I intend to introduce this in evidence now, and the original when I get it from my files.

[fol. 69] Mr. Goodgold: I will not take it in evidence; I will admit it for identification.

Mr. Stockton: It hasn't been offered in evidence.

Mr. Goodgold: I will strike it out, for it appears that there is an original in your files.

Mr. Stockton: The ground work indicates that the agreement is evidenced by the original and the carbon, and I submit that the document is in reality, that the carbon is a document, and is in reality an original; where it has been returned by the other side, the carbon may constitute evidence just as an original.

Mr. Goodgold: Only where the original——

Mr. Stockton: There is no evidence of that, but this has an original signature.

Mr. Goodgold: It hasn't got the original signature of the writer of the letter.

Mr. Stockton: It has the original signature of Mr. Cauchois.

By Mr. Stockton:

Q. Mr. Ficken, you signed Mr. Mellar's name on the original of this thing, didn't you?

A. Yes.

Q. And you put the stamp on here?

A. The stenographer put the stamp on.

Q. Under your authorization?

A. Yes.

By Mr. Goodgold:

Q. Then it isn't an exact copy of the original?

A. It is, lacking the original signature.

Q. So it isn't an exact copy?

A. Except for the original signature.

[fol. 70] Mr. Goodgold: Which is the all important thing on the original. I will receive it for identification, and if you want to introduce the other one in evidence, why we will accept that in evidence.

By Mr. Stockton:

Q. You have testified, Mr. Ficken, that you received this back from the French Line with Mr. Cauchois' name signed on it?

A. I have.

Q. Is that right?

Mr. Stockton: Now that is all, subject to your right to cross-examination further of Mr. Ficken; I will withdraw Mr. Ficken and resume with Mr. Cauchois.

Oscar R. Cauchois, recalled, testified as follows:

By Mr. Stockton:

Q. Mr. Cauchois, I show you Taxpayer's Exhibit 11 for identification and ask you if it has your signature on the bottom of it?

A. Yes.

Q. And did you return that to Mr. Fricken of the Standard Oil Company of New Jersey?

A. I did.

Q. And did you do that at or about the time of the receipt of the letter dated May 10, 1932, Taxpayer's Exhibit 11 for identification?

A. To the best of my recollection it was done immediately on receipt.

Q. In other words, what you received was an original and a carbon together, did you not?

A. Yes.

[fol. 71] Q. And the carbon was this Exhibit 11 for identification?

A. Yes.

Q. And you kept the original and you returned the Exhibit 11 for identification to Mr. Ficken with your notation on it?

A. Yes, sir.

Q. For what purpose?

A. Why to explain to him or to confirm that price mentioned there was at the terminal Bayonne and that I would pay him, and that in addition to that price in Bayonne, to have it alongside my steamer, I was to pay on the fuel oil, five cents, and six and a half cents for the diesel, f. a. s., free alongside, that was all they would deliver on this price plus that, because I had to figure some steam, but was obligated for them to put it in. In other words I paid for the steam.

Q. In other words you were confirming your understanding of the contract to Mr. Ficken and to the Standard Oil Company of New Jersey?

A. I was confirming to them that this price——

Q. That this price?

A. That this price, whatever the price was, it would advance 10¢ to that amount, for the price stipulated in the contract had been advanced on that date.

Q. Advanced 10¢ to $1.50?

A. 10¢ to 75¢ a barrel, from 65¢.

Mr. Goodgold: All this testimony he has given is entirely irrelevant right now because the document is not in evidence.

Mr. Stockton: This is laying further ground work.

Mr. Goodgold: It still has only been received for identification.

Mr. Stockton: I will offer it in evidence.

[fol. 72] Mr. Goodgold: As the reply of Mr. Cauchois to the original letter received by him; but if you offer it as the original letter received by Mr. Cauchois, from the Standard Oil Company, I will rule it out as evidence.

Mr. Stockton: I entirely agree with the Comptroller's ruling on that point, and do not offer this as the original letter, but offer it as the reply of Mr. Cauchois to the letter from the Standard Oil Company of New Jersey to the French Line, of the same date.

Mr. Goodgold: There is no objection to offering it on that basis.

(Exhibit 11 for Identification received and marked Exhibit No. 11 in Evidence.)

By Mr. Burke:

Q. Mr. Cauchois, showing you Exhibit 11 in evidence, I ask you, is that your handwriting, "plus on fuel oil" price?

A. That is my handwriting.

Q. This is also yours?

A. That is my signature.

Mr. Stockton: Yes, I will follow that line in making it clear.

By Mr. Stockton:

Q. That also is your underlining?

A. Underlining?

Q. Under the words "both ex terminal, Bayonne?"

A. To stipulate that price was at Bayonne in case I wanted to send a steamer to Bayonne, I had this quotation: [fol. 73] then if the barge was in New York, they would have to pay this additional on this and that, but if they took it to Bayonne, it was this and that; there was no question of sending any particular shipment at that particular moment, because we had no particular cargo ship at that time, but it might have come up the next day, in which case that letter would show that that is what we would have to pay at Bayonne, but if I wanted it in New York, that is what we would have to pay.

Mr. Burke: If you wanted it in New York?

Q. If you wanted it in New York, you would have to pay the additional?

A. Additional five and a half cents on fuel oil and six cents on diesel.

By Mr. Goodgold:

Q. In other words, you mean you would have to pay the additional freight?

A. Additional.

Q. Additional cost from Bayonne?

A. Yes, if I went over to Bayonne, I wouldn't have to pay it, like I do in Philadelphia, I move the ships at night.

Q. In other words, this is the additional amount you would have to pay under that contract, if the Standard Oil Company delivered it to your ships F. A. S. New York City?

A. If we ordered, we would have to pay that; now, the reason the Diesel is higher is because the Diesel, we don't usually take more than 1,000 barrels, 1,500 barrels, and 1,000 barrels; and the Standard Oil Company doesn't carry deliveries less than $97.50, which would be on 1,500 barrels at 6½ cents per barrel, so I would have to pay 6½ but the [fol. 74] minimum would be 6½ cents, so that would make $97.50 for the Diesel.

By Mr. Stockton:

Q. As a matter of fact, Mr. Cauchois, all the bunkering of your ships done by the Standard Oil Company of New Jersey has been done alongside of the ship, has it not?

A. Yes.

Q. In other words, during the entire period of these contracts starting with the beginning of the year 1928, up to the end of the tax period here, December 31, 1935, never have you had occasion to put a ship alongside the Standard Oil Company of New Jersey plant, at Bayonne, New Jersey, have you?

Mr. Burke: Isn't that rather a leading question, Mr. Stockton?

Mr. Goodgold: Will you please repeat the question?

Mr. Stockton: Just to save time——

Mr. Burke: Will you qualify that as to what he did or did not do?

Q. Did you understand that?

A. No.

Mr. Goodgold: That is a very important leading question; I will have to ask you to rephrase the question.

Mr. Stockton: Yes, I will reframe the question.

Q. During the period from the beginning of 1928, to the end of the year 1935, have you ever or has the French Line ever put one of its ships alongside the plant of the Standard Oil Company of New Jersey, at Bayonne, New Jersey, to obtain fuel oil?

[fol. 75] By Mr. Burke:

Q. Just before you answer that?

A. Yes, sir.

Q. Mr. Cauchois testified earlier that he was advisory director from 1931 to January, 1934, and from that time he was nothing but honorary manager. Now, I don't know what his duties are as honorary manager, but clearly the testimony you are asking him to give during the taxable period thus far, we have no proof that he knows anything about it.

A. During—I will qualify that, I will qualify that; during the period you state, there was no steamship up to Bayonne, I had no occasion to send them there; since 1934 I am conversant with the ships, and—they haven't gone since I left in 1934, for the reason that they had no freight oil burners here.

Q. Only freight oil burners go to Bayonne?

A. They are the only ones that go.

Q. Because of the draft?

A. Because of the draft alongside, which was given to me as thirty feet.

Q. Are you actively engaged with the French Line day by day, are you in their offices?

A. Not day by day.

Q. You have offices at the pier and at the——

A. Both at the offices and pier; I am in touch with the maritime business of the company, which still interests me after so many years.

Q. Well, as honorary manager are you still in the employ of the company?

A. I am still under a pension from the company.

By Mr. Goodgold:

Q. You are under a pension from the company?

A. Yes, sir.

Q. You are not regularly employed there?

A. I am not what?

[fol. 76] Q. You are not regularly employed there?

A. I would be considered an employee as an honorary director.

Q. You are an ex-employee of the company?

A. What is that?

Q. You are an ex-employee of the company?

A. I am not an employee, but I am still in the employ of the company, and subject to any demands for any information.

Q. Not if you are not an employee?

A. Yes, sir, that is part of my understanding as the honorary manager, that I shall be at their disposal for any information they want to ask me.

Q. Suppose you tell me exactly what your duties are as honorary manager?

A. My duties?

Q. Yes, sir.

A. Simply to be at the call of the general manager for any information in the past or that I may have in the future that may interest the company.

Q. You are not obligated at any time to be at the company's premises or the steamship, or at their offices?

A. No, I am not obligated to be there at any time, but I am obligated——

Q. Isn't it purely an honorary position which you hold and a position which obliges you to give information if called upon to give such inform .tion?

A. Yes, sir.

Q. In no other respects are you employed by the company?

A. No, I don't consider myself an employee.

Mr. Goodgold: Then I will have to rule out, Mr. Stockton, any testimony with respect to anything this witness is testifying to after the time he became honorary manager.

[fol. 77] By Mr. Stockton:

Q. Within your personal knowledge, Mr. Cauchois as to whether any of the French Line ships have been put alongside the Standard Oil piers in Bayonne, since December 10, 1934——

A. Certainly, yes, there have been no ships of the French Line to my personal knowledge.

By Mr. Goodgold:

Q. Will you please state for the record just what is your basis of this personal knowledge?

A. My basis of——

Q. This personal knowledge, which you have, that at no time since 1934, during the time when you became honorary manager—director, that these ships were at no time tied up alongside the plant in Bayonne?

A. Because I follow the sailings and the arrivings, regularly, all the time, and know just exactly the movements of the ships, how long they remain in New York, and where they go.

Q. Are you required to do this?

A. I am not required to do that; I am not obligated to do it, but I do it.

Q. Is this a hobby of yours?

A. Yes, if you want to say so; it is a hobby of mine to keep in the know.

Q. Would you know if the ships came from Bayonne?

A. I would know if they came from Bayonne or from the piers.

Q. How would you know that?

A. Because I am in contact with the superintendent all the time; I would know if they go there, and I spend time on the steamers.

By Mr. Stockton:

Q. Let me ask you this, Mr. Cauchois, would it be possible to put any of the present time French Line ships alongside [fol. 78] the piers in Bayonne?

A. No, sir, not at present, none of the ships you have are light enough, neither freight nor cargo ships.

Q. And why is that?

A. Why is that? Because of the draft of water there, not sufficient for the draft of the ships we have.

Mr. Goodgold: I will permit the witness' testimony to stay in the record, where I have ordered it stricken out before; I don't think it is material any way.

Q. Tell me, Mr. Cauchois, the fuel oil contract of November 19, 1929, Taxpayer's Exhibit 10, related to what kind of oil?

A. Fuel oil.

Q. And just what is fuel oil used for?

A. For the propulsion of ships, motor power of ships.

Q. In what way; that is, it is used as fuel to raise steam?

A. Fuel to raise steam same as coal.

Q. Now what is diesel oil?

A. Diesel oil is another class of oil which is specifically used on motor ships, that have diesel engines that cannot use fuel oil.

Q. And that is used in those engines as internal combustion engines?

A. Well, that may be a technical question; all I know is that they are diesel engines, ships have to have a special oil.

Q. Is there any ship of the French Line which is a motor ship and uses special oil?

A. The Lafayette on this coast; we have one on the Pacific Coast.

Q. And about what time did she go into commission, into service here, roughly?

A. I should say about 1930.

[fol. 79] Q. Now I show you——

A. 1930.

Q. Now I show you a letter; does the date of that letter refresh your recollection as to when the Lafayette went into service?

A. Well, because this is dated September 2, 1931, I anticipated this was for the fuel oil.

Q. That is for diesel oil?

A. Yes, knowing that the Lafayette would be in service, between—would be in service about the beginning of that year, I then made a contract.

Q. At the beginning of the year 1932?

A. I made a contract with them to cover my provisions for her when she got into service, that she might come any time between 1932 and 1933.

Q. I show you a paper and ask you if that is the contract?

A. That is my signature.

Q. And Mr. Mellar's signature?

A. To my recollection, that is Mr. Mellar's signature. It was not only signed, it was stamped. I think Mr. Mellar sometimes used to stamp his letters.

Mr. Burke: Will you be able to tie a later contract up with this one, this is the first, I take it?

Mr. Stockton: Yes.

Mr. Burke: It only covers the period up to December, 1933.

Mr. Stockton: Yes, this was extended to December 31, 1934.

Mr. Goodgold: December 31, 1934?

Mr. Stockton: December 31, 1934.

Mr. Burke: Is that as far as it goes?

Mr. Stockton: No, there was another extension by another man.

Mr. Goodgold: Well, we will receive it in evidence, by [fol. 80] your showing that it is the basis of a further extension of the contract.

(Received and marked Taxpayer's Exhibit No. 12 in Evidence.)

Mr. Goodgold: Of course, all of these documents that you are taking, you will mail your substitutes over so that we have copies of them?

Mr. Stockton: Some, yes, I think I can do it this afternoon, Mr. Goodgold.

By Mr. Stockton:

Q. And I show you a letter dated April 7, 1933, from the Standard Oil Company of New Jersey with regard to diesel oil, and ask you if that is a contract that extended the contract, Taxpayer's Exhibit 12?

A. Yes; that is my signature.

Q. And that is your signature on it?

A. And that is Mr. Mellar's signature.

Q. That is the signature, to the best of your recollection?

A. To the best of my recollection it is Mr. Mellar's signature.

Mr. Stockton: I offer that in evidence.

Mr. Burke: No objection.

(Received and marked Taxpayer's Exhibit No. 13 in Evidence.)

Q. You stated that you knew who Mr. Jean Artur was?

A. Yes.

Q. And you know his signature?

A. Very well.

Q. I show you a paper and ask you if that is signed by Mr. Artur?

A. That is Mr. Artur's signature.

Mr. Stockton: I offer that in evidence, that is the continuation.

[fol. 81] Mr. Burke: This is the continuation?

Mr. Stockton: It brings it down for the year 1935.

Mr. Burke: He recognized the signature; he is not competent to testify as to the contents.

Mr. Stockton: Oh, no, I am not asking that; it is just that it is signed by Mr. Artur.

Mr. Goodgold: Will you proceed?

Mr. Stockton: This is offered.

Mr. Burke: Mr. Cauchois testified to that; you are not contending that Mr. Cauchois testified to that other than to the signature.

Mr. Stockton: He testified as to Mr. Artur's signature, and if you want I can have another witness testify as to Mr. Connolly's signature.

Mr. Goodgold: We don't object.

Mr. Stockton: In other words, that is offered as a contract between the Standard Oil Company and the French Line.

Mr. Goodgold: We will admit the authenticity of the signatures of any contract you submit; why do you sbmit it at this time?

Mr. Stockton: We put it in at this time simply because he has proved—we have two kinds of fuel oil, diesel and bunker.

Mr. Goodgold: That is all right; then you can have somebody else testify as to his knowledge during the period under review.

Mr. Stockton: That is a separate thing, but we can't do [fol. 82] anything in proving the contract except to prove it, and I simply want to prove it so as to complete the period here. I offer it in evidence.

Mr. Goodgold: We have no objection to receiving it in evidence.

Mr. Stockton: Then I ask to have it marked.

Mr. Goodgold: All right.

(Received and marked Taxpayer's Exhibit No. 14 in Evidence, printed contract.)

By Mr. Stockton:

Q. Now, when you made these contracts which we put in evidence, Mr. Cauchois, including the latest one for bunker oil, Taxpayer's Exhibit 10—and the——

Mr. Goodgold: The latest one was Exhibit No. 13.

Q. I mean the latest one for Bunker Oil, which was Taxpayer's Exhibit 10, and the diesel oil contracts, Taxpayer's Exhibits 12 and 13, covering part of the taxpayer's——

Mr. Burke: Just a moment, Mr. Cauchois isn't competent to testify as to that last diesel contract. (Off the record discussion.)

Witness: You are referring to the exhibit as to the contract expired in 1936, December, the fuel oil?

Q. The bunker fuel oil, 1936?

A. Bunker fuel oil, 1936.

Q. And the first two diesel oil contracts you made which expired December 31, 1934?

A. Yes.

[fol. 83] Q. Now, in making those contracts, you were buying the product of the Standard Oil Company of New Jersey, were you not?

A. Yes.

Q. And what you contracted for, to take, was Standard Oil from the Standard Oil Company of New Jersey, is that right?

Mr. Burke: The contract speaks for itself on that score.

Mr. Stockton: Not entirely.

Q. And that was the product that you expected them to furnish under that contract, is that right?

Mr. Burke: I object to that question because the contract specifies the particular type of product to be furnished both the bunker oil and also the diesel oil.

Mr. Goodgold: Objection sustained.

Mr. Stockton: Exception.

Q. Did you know when you made those contracts where the oil was coming from to your ships?

Mr. Burke: I also object to that question because there is a contract in both instances.

Mr. Goodgold: Objection sustained.

Mr. Stockton: Exception, and I will call the Comptroller's attention to the fact that the contracts do not all state where the oil comes from.

Mr. Goodgold: Certainly, Mr. Stockton, you are asking for an opinion at this time.

Mr. Stockton: No, I am asking him what he knows. If you buy something that is coming from New Jersey, and you [fol. 84] know you are going to get that thing, and then you are buying something that is not stated in the contract——

Mr. Goodgold: I still think it is a conclusion; it is not an expression of knowledge or fact.

Mr. Stockton: It is an expression of knowledge.

Mr. Goodgold: Not until he receives it.

By Mr. Stockton:

Q. Up to the time that you retired from active service, January 1, 1934, do you know of any instances of deliveries under the bunker oil contract with the Standard Oil Company of New Jersey, which was made of oil other than their own oil from their own plant at Bayonne?

A. I do not.

Mr. Burke: Does this witness have any personal knowledge to that effect in any way?

Mr. Stockton: He might; I am establishing that he doesn't know of any.

Mr. Goodgold: I think the delivery receipts are the best evidence in this case; the witness' testimony is entirely incompetent.

Mr. Stockton: They will be very good in evidence, but while this witness is here, we ought to get his testimony on that.

Mr. Goodgold: It is true, but that is not the best testimony, Mr. Counsellor, the best testimony, the best evidence, are the original delivery receipts showing from what point the shipment was made.

[fol. 85] Mr. Stockton: We will give that, but it also has a bearing as to what this witness knows.

Mr. Goodgold: As a matter of fact, counsellor, I think the testimony thus far given by this witness relates only to the period prior to the period which is subject to review. In other words, it relates to a period prior to January 1, 1934, of which we are not in the least bit interested.

Mr. Stockton: Well you are interested in this way; whether you like it or not, that this is under deliveries for this period, or under a contract made in 1929, and the question is what was that contract, what were the understandings of all the parties with regard to it, what was the practice under it; what was the regular course of business under it, and a great deal of that may relate to a period before the taxable period.

Mr. Goodgold: It is clearly shown by the evidence thus far introduced, by the documentary evidence, that all of these contracts have been subject to change, both as to the price and method of delivery, and then——

Mr. Stockton: I object to that statement, and I object seriously to the statement and call the Comptroller's attention to the fact that that is a statement by the Comptroller which is not in accordance with the facts as shown in this record.

Mr. Goodgold: Well the evidence will speak for itself, if I am wrong.

[fol. 86] Mr. Stockton: There is no provision that there should be changes in the method of delivery.

Mr. Goodgold: The contract, the evidence, shows changes in price, changes in delivery.

Mr. Stockton: I object again to the statement again as prejudicial and as not in accordance with the facts shown on the record.

Mr. Goodgold: The contract shows the price to be charged is the result of the method of delivery.

Mr. Stockton: I will ask the Comptroller to point out that exhibit.

Mr. Goodgold: Exhibit No. 11, changes the method of delivery and the method of charging the price, if I understand the meaning of the terms there.

Mr. Stockton: I am glad that the Comptroller called attention to that, because I will make that clear.

By Mr. Stockton:

Q. Mr. Cauchois, in referring to Taxpayer's Exhibit 11, of which I show you a copy, there was a change there as to price, was there not?

A. Price at Bayonne, yes.

Q. Was there any change in that letter as to the method of delivery or from whence delivery should be made?

A. The price or the method of delivery never changed from the time we made our contract.

Q. The price did change?

A. The price of the oil did change.

[fol. 87] Mr. Goodgold: I withdraw my statement from the record, if that will suit you, and I am going to declare an adjournment at this time. Examination adjourned to June 21, 1937, at 10:00 A. M., to continue for full day.

Hearings Continued, June 21, 1937

Mr. Goodgold: This is a continuation of the hearing held on June 10, 1937.

Oscar R. Cauchois, recalled as a witness on behalf of the taxpayer, testifies as follows:

Direct examination.

By Mr. Stockton:

Q. Mr. Cauchois, I show you a letter dated May 10, 1932, and ask you if you received that from the Standard Oil Company of New Jersey?

A. Yes.

Q. And did you make those notations that appear on it?

A. I did.

Mr. Stockton: I offer that in evidence.

Mr. Burke: This is the original of the photostatic letter offered last time. Taxpayer's Exhibit 11, admitted in evidence at that time?

Mr. Stockton: That is correct; this is the letter of which Exhibit 11, admitted in evidence, is the acknowledgment.

Mr. Burke: No objection to it; do you want to have that marked Taxpayer's Exhibit 11 in evidence in lieu of this one, or do you want both in?

[fol. 88] Mr. Stockton: Oh, no, I am not substituting it for that.

Mr. Burke: All right.

Mr. Goodgold: This is Taxpayer's Exhibit 15.

(Letter received and marked Taxpayer's Exhibit No. 15 in Evidence.)

By Mr. Stockton:

Q. I show you Taxpayer's Exhibit 15, Mr. Cauchois; did you receive that together with Taxpayer's Exhibit 11, of which I show you a copy?

A. Yes, at the same time.

Q. The two came to you in the mail at the same time?

A. That is a photostat, you know (Pointing to Taxpayer's Exhibit 11).

Q. Yes, I understand that. You received those two letters in the mail at the same time, and what did you do with them?

A. I noted one, the duplicate (Taxpayer's Exhibit 11).

Q. Will you let me see the original exhibit, please. This is the photostat that is the actual exhibit in evidence.

A. That is what I received.

Q. You received the original of this exhibit?

Mr. Burke: I think he testified to that before.

Witness: This is the original I received, and there is the copy.

By Mr. Stockton:

Q. Now, when you say there is the original, you are pointing to Taxpayer's Exhibit 15?

A. Yes, the original I received.

Q. And Taxpayer's 11 is the copy you received at the same time?

A. Yes.

[fol. 89] Q. And then, as you testified, you made those notations on Exhibit 11 and returned it to the Standard Oil Company of New Jersey?

A. Standard Oil Company of New Jersey.

Q. For what purpose?

A. To emphasize or to inform them I noted the increase in price was from Bayonne, but in addition to that there was to be a barge fee on that.

Q. Will you tell why you put it on Exhibit 15?

A. And the reason I put it on the original was to send the original to the Accounting Department to keep on file so when the bills came in, billed at these prices, they were to note that there was an additional 5¢ and 6½¢ to be allowed to cover the barging.

Q. When you say the "Accounting Department," in that connection you mean the French Line Accounting Department?

A. Oh, the French Line Accounting Department which is notified of every change.

Q. I call your attention, Mr. Cauchois, to the fact that in Taxpayer's Exhibit 5 there is a clause at the bottom of that contract, in the next to the last paragraph, saying that should the Standard Oil price at New York exceed by 15¢ a barrel, the price quoted by other companies, the French Line would have the privilege of purchasing from other suppliers; did that condition ever arise— In the event of the failure of the Standard Oil to meet such competitive prices?

A. Yes.

Q. Did that condition arise where the Standard Oil failed to meet competitive prices and where you bought elsewhere?

A. No.

Q. That same clause applies in Exhibits 7 and 10, and is your answer the same that that condition never arose where [fol. 90] the Standard Oil failed to meet the competitive price?

A. They never; the Standard Oil met the price.

Q. So that you never bought anywhere else in the duration of these contracts, when you were active except from the Standard Oil of New Jersey?

A. We got the benefit of the lower rate from the Standard Oil; we continued buying from them and they met the price.

Q. Referring to Taxpayer's Exhibits 15 and 11, did that letter work any change in the contract provisions for either price or delivery?

A. Not in the terms of the contract; it simply fixed the price at that time but it didn't change the contract any.

Q. I refer you to Taxpayer's Exhibit 10, to the last paragraph on the first page of that exhibit, of which I show you a copy?

A. Well, what about it?

Q. Which provides that in the event of any change in the price, notice should promptly be given to the French Line by the Standard Oil?

A. That was the reason of that letter.

Q. That was the reason of that letter of May 10, 1932?

A. Giving the change of price.

Q. Referred to as Taxpayer's Exhibit 11 and 15?

A. Being the change in price only.

Q. But was there any change in the method of delivery indicated by your notes for barging?

A. No.

Mr. Burke: Just a moment, the method of delivery is specified in the contracts themselves, and he just testified that those two exhibits, Taxpayer's 11 and 15, do not in any way vary the terms of the contract except as to price; the question of delivery is not changed at all.

[fol. 91] Mr. Stockton: Right; that is what I wanted definitely understood.

Q. There was no change in the method of delivery from the beginning of your contracts with the Standard Oil?

A. Oh, no.

(Off the record discussion.)

Q. Mr. Cauchois, the Compagnie Generale Transatlantique, that is a corporation?

A. A foreign corporation, a French corporation, incorporated under the laws of France.

Q. And it has always existed under the laws of the Republic of France, has it not?

A. Oh, yes.

Q. The ships which were named in the contract you made, going back to the letter of October 14, 1927, Taxpayer's Exhibit 1, were the Ile de France, the Paris, the France and the De Grasse?

A. Yes.

Q. Were those ships all owned by the Compagnie Generale Transatlantique?

A. All owned by the Compagnie Generale Transatlantique, under the French flag, registered in the ports of France.

Q. What is the port of registry of those ships, do you recall?

A. I am not sure of the De Grasse; it might have been Saint- Nazaire, either Ste. Nazaire or Havre; usually it is where they are built, but when they build them, very often they use a home port, such as Le Havre and Marseilles.

Q. So that these four ships are all registered in French ports?

A. Yes.

Q. Now when you retired from active management of the [fol. 92] French Line affairs here in January 1, 1934, was it not?

A. January 1, 1934, I retired as advisory counsel.

Q. You became honorary director?

A. I became honorary director.

Q. At that time did you speak to anyone in the French Line office here about carrying on the fuel oil contracts?

A. Well, prior to that date, whether it was one or two months or three months, I was instructed by the manager in turning over all my records to explain and confer with Captain Castelnau, who was our assistant marine superintendent at that time and to turn all the documents—turn all the files over to him in regard to oil and to explain to him how the contracts were made or how they had been made for his information for future business after the expiration of that contract which expired on the 31st of December, 1936, which was probably 15, 16 months before I resigned.

Q. And did you do so?

A. I did so; I called him to my office and gave him the files and explained all the contracts and all methods of handling the contracts, the orders, and the deliveries, and so forth, so that he would be thoroughly conversant with it and able to carry on where I was leaving off the active part of it.

Mr. Stockton: That's all.

Mr. Goodgold: Of course, we have given you a lot of latitude in putting that on the record; given it to you without an objection.

Mr. Stockton: Yes, I appreciate that, Mr. Goodgold, and I understand that it is in the interests of getting a clear record.

[fol. 93] Cross-examination.

By Mr. Burke:

Q. Mr. Cauchois, is your company, the French Line, authorized to do business in the State of New York?

A. Yes, I believe they have a charter or a permit from the State Department, not that I am positive, because at one time there in our employers' insurance—yes, they had

a permit, as I understand it; they had a permit from the State of New York to do business.

Q. And where are the executive offices of the French Line?

A. Paris.

Q. Do you have offices in the City of New York?

A. We have.

Q. And did you have during the taxable period offices in the City of New York?

A. Taxable period?

Q. December 10, 1934, to December 31, 1935?

A. Yes.

Q. And where were they located?

A. In 1934, or 1935, it was at 19 State Street.

Mr. Goodgold: New York City?

Witness: Yes, New York City.

A. (Continuing:) I think it may have been 1935 that—sometime during 1935, they moved their executive and passenger office up to 610 Fifth Avenue.

Mr. Goodgold: New York City?

Witness: New York City.

A. (Continuing:) But they always retained and they still retain their freight office in 19 State Street, New York City.

[fol. 94] By Mr. Burke:

Q. What officers of the French Line have their head quarters in the City of New York?

A. The executive, the passenger and the Accounting Department offices, with the general manager, are 610 Fifth Avenue, Manhattan.

By Mr. Goodgold:

Q. Just a little more in detail; will you enumerate the different officers of each department?

A. The officers of each department?

Q. Yes.

A. The executive officers?

Q. Who are they?

A. Who are the officers of the executive? There is Mr. De Linclay, the general manager, and Mr. Artur, the assistant general manager, and there is Mr. Dal Paiz, who is the

head of the secretarial department, and then we have an advertising and publicity department—do you want to know the name of those men, publicity?

Q. Yes.

A. Well, the publicity department when they moved uptown was Mr. Morgan, but 1936 Mr. Morgan retired and Mr. Knight became the manager of that department. The accounting department at both—and the manager of the freight department, the traffic manager, was Mr. Dendiesel, at 19 State Street, Manhattan. The account department was under the charge of, I think in 1934, Mr. Merchadier, and his assistant was Mr. Haessig, and Mr. Merchadier was succeeded in 1936, anyhow during that period, by Mr. Carron. The operating department was—by the operating department I mean the wharf service, was under charge of Mr. Thomas M. Wolfe, and was located at Pier 57, foot of West 15th Street, Manhattan; and he was succeeded—[fol. 95] he was assisted by Mr. Castelnau. Mr. Wolfe died, I think, in 1936, and——

Mr. Stockton: Died in 1935.

Witness: 1935, and he was succeeded temporarily by Mr. Castelnau, who acted as the superintendent, and ultimately by Mr. Lefriant, and Mr. Castelnau was his assistant. Mr. Lefriant was located at—and Mr. Castelnau, at pier 88, foot of 48th Street, Manhattan.

By Mr. Burke:

Q. Mr. Cauchois, was the purchasing department of the French Line also located in the City of New York during the taxable period?

A. Yes.

Q. And who was in charge of that department?

A. Well, you want the taxable period, don't you? You don't care before that.

Q. Taxable period.

A. Mr. Craig.

Q. And where did he have his office?

A. He had his office on Pier 57.

Mr. Goodgold: New York City?

Witness: New York City, and now Pier 88, New York City.

Q. Where did the directors' meetings of the French Line take place?

A. In Paris.

Q. In all cases in Paris?

A. Yes.

Q. Did any meetings take place here in New York City?

A. Never any official meetings of the company here.

Q. Were all dividends of the company declared in Paris also, or here in New York?

A. Only in Paris.

Q. In what business was the French Line engaged in the City of New York?

A. In——

[fol. 96] Q. Did you solicit freight here?

A. Did I what?

Q. Did your company solicit freight in the City of New York?

A. Oh, yes.

Q. And they have a large freight department here?

A. Yes.

Q. With salesmen going out soliciting business, is that correct?

A. Yes.

Q. And you also have your own steamship ticket salesroom here in the City of New York, do you not?

A. Yes, not only in the office, but through the various tourist agencies—you are talking of New York.

Q. That is right, New York; but your company sells steamship tickets direct to the purchaser?

A. At New York?

Q. Yes.

A. Yes.

Q. Where are all the records of the French Line kept?

A. Well, we kept the original records here at New York of everything that was done in New York, all the business for the New York agencies and the agencies through the United States, we kept here in New York up to a certain time, and then we destroyed them.

Q. How long did you usually keep them on hand here?

A. Well, sometimes they were kept up to ten years, sometimes maybe a little longer, sometimes a little shorter. When they got to be too bulky, why they were destroyed.

Q. And those records had to do with all the business of the French Line anywhere in the United States, is that correct?

A. Yes, it was all centered in New York, the business in the United States and Canada.

Q. Was all the purchasing for the French Line throughout the United States and in Canada done through your [fol. 97] New York office?

A. No, it was not. On our Pacific Line and our Southern Lines, Gulf Lines and our South Atlantic ports, they were purchased at the ports of call, but the bills came to New York after being verified by the various parties interested, that is, the stewards and the pursers and the captains and the agents, certifying as to quantities and as to price, market price, and on their verifications being correct, either the agents paid, deducted it from their account current with us or else we paid direct.

Q. Well, in the cases where payment was made direct you mean direct from the New York City office?

A. No, I don't—yes—no, I don't, I mean direct from the agency.

Q. I see; did the New York agency take care of any of the payments of these items that were purchased throughout the country?

A. Well, I am not conversant, only superficially, as to whether everything was paid by those agents or whether some of the bills were paid at New York. I will particularly say coal, for instance; the bills were all sent to New York and paid here. Coal was not in this period, but the agents ran an account current which they sent to us. Now as to the records we have kept, Paris got from us every month an account current showing every item both the credit for the prepaid freight, for the passengers and the expenses or the debits for the expenses; and those were sent to Paris; I suppose they kept them there; I don't know what their method of accounting was.

Q. But those accounts current were made up in your office?

A. Not all.

Q. Where else would they be made up?

A. In San Francisco, Los Angeles, California; they would [fol. 98] be made up direct by the agents and sent direct to Paris.

Q. When you speak of the agents you mean the agents of the French Line?

A. Yes, and those of the Gulf and the South Atlantic, I think those—they didn't communicate direct. I would like to explain; I think New Orleans and San Francisco——

Mr. Burke: Just a moment.

Mr. Stockton: I think we might get picture completely.

Witness: I want to explain that San Francisco and New Orleans could communicate with the Paris office and send a duplicate to us, but Canada and South Atlantic always sent to New York and we sent it to Paris.

Q. But so far as all purchases that were made in New York City are concerned, the record of those purchases were kept right here in your New York City office, isn't that correct?

A. For a certain period.

Q. And then destroyed?

A. Yes, sir.

Q. Only a resumé or an accounting of those purchases was sent to Paris, isn't that so?

A. An account current was sent, each month, to Paris.

Q. Now, Mr. Cauchois, just what are your duties as honorary manager?

A. Well, I haven't any particular duties except to report to hold myself subject to the orders of the General Manager at New York.

Q. Do you have an office with the French Line at the present time?

A. I have not.

[fol. 99] Q. Have you had one since January 1, 1934?

A. I have not, my mail goes there.

Q. Is it forwarded to you at your home in that event?

A. Yes.

Q. Do you draw any salary as salary from the French Line by reason of your being an honorary manager?

A. Only a pension.

Q. Since January 1, 1934, were all of the duties which were formerly yours as advisory counsel now being performed by someone else of the French Line?

A. I can't answer that; I don't know what they are performing; I know what I am performing, I don't know what they are performing.

Q. Prior to January 1, 1934, you were instructed, I believe you testified to turn over all the records and papers which you had in your possession to Captain Castelnau?

A. Yes.

Q. But the work that was done by you as advisory counsel is now being performed by someone else, isn't that correct?

A. By someone else, by the various parties, I presume.

Q. Now, will you be good enough to tell us what your duties were in each of the various capacities that you acted in during your career with the French Line?

A. When I first went to the French Line in 1875, I went as assistant freight clerk. I then—I can't tell exactly how many years.

By Mr. Goodgold:

Q. Just tell us what your duties were in respect to each position you held?

A. Oh, they were to engage freight, and to superintend the making of the manifest of the freight, and so on; later [fol. 100] on, I suppose about ten years afterwards—about thirteen years afterward, I was made the assistant agent and still retained the title of freight agent also. Freight traffic manager was the title, and as assistant agent I had a general knowledge of everything that went on in both freight and traffic departments and had to act—— One of my agreements with the company was that I had to act at all times in the absence of the manager temporarily or at any particular time or in his absence on vacation as general agent.

Q. What were your duties as general agent?

A. What were my duties?

A. Why the general management of the whole United States and Canadian agency.

Q. Will you tell us in detail just what your duties consisted of?

A. Details?

Q. Yes, just what you had to do with the New York management?

A. The general policy of the New York agency at New York here, seeing that the accounts current were sent regularly, kept track of the cash account of the company and see that each department was properly supplied with a number of employees necessary, of which the heads of departments would come to me and say that they needed more employees, in fact, the general management of the company, the same as the general manager does now.

Q. Then as the general managing agent, did you attend to all details of the company?

A. No, I didn't attend to the details but I was conversant with them, every detail.

Q. Was your function to enter into purchasing contracts as general managing agent?

A. Certain contracts, yes.

[fol. 101] Q. Purchasing contracts with respect to the purchase of fuel oil?

A. Yes, I was the only one up to the time of my retirement that ever contracted for fuel oil; the company gave me carte blanche to go ahead and make the contracts, subject, of course, to notification to the Paris office of what I was going to do, of how long the contract was going to run, and the conditions of the contract which they authorized me to do, and I signed them all.

Q. No one else had anything to do with the purchase of fuel oil while you were in the active employ of the company?

A. No, sir; in fact, the contracts extended beyond the period before I retired; so, of course, the contracts had to stand.

Q. Will you go on from where you left off as managing agent, what was your function?

A. To my knowledge, they continued on up to the expiration of the contract.

Q. I say, will you go on with a statment of your duties after you became managing agent?

A. After I became managing agent?

Q. After that, what other offices did you hold?

A. I was only managing agent during the absence of the managing agent on vacation, or during his trips through the whole country; otherwise I was not managing agent.

Q. What were you doing at that time?

A. I was the advisory from 1921 up to 1932, I think.

By Mr. Burke:

Q. Now, Mr. Cauchois, I show you Taxpayer's Exhibit 1 in Evidence which represents an agreement between the Standard Oil Company of New Jersey and the French Line [fol. 102] for the purchase of bunker fuel oil, and I ask you to give us all of the negotiations which surrounded the making of that agreement, that is, where they took place, with whom, what was said, when, and the entire story, as best you know it?

A. Well, to the best of my recollection, the agreement was made with Mr. Michler, who was the manager of the

Sales Department of the Fuel Oil Division of the Standard Oil Company of New Jersey. It took place in my office, after various discussions as to the conditions that I wanted embodied in the contract and as to the maximum quantities that I would agree or they would agree to give us, during any one year of the contract, during the duration of the contract. And I stipulated at the time, which was embodied in the contract, that they were to furnish me with all the oil, all the fuel oil, that I might require, for the use of the steamers, to employ in the service of the French Line from New York, and I based the quantity necessary on the maximum of these four steamers that were then in service as fast passenger steamers would require—more than they would require, because I left a large margin of two million barrels to cover any prospective freight steamers that might have come to New York during the year, but I wasn't obligated to take any specific quantity only for what I needed, which gave me the privilege of carrying sufficient oil from France if the market was better and only carrying the sufficient amount for the return; or if the market was better in New York we would take just sufficient in France to bring her up here, and then we would fill up the ship here to the full of her tanks.

[fol. 103] Q. At the time the contract was entered here, as represented by Taxpayer's Exhibit 1, were those four ships the only fuel oil burners that the company had?

A. On the New York line, yes.

Q. Did you have any freight steamers burning oil at that time?

A. Not on the New York line; we were building, we were replacing our fleet; it was practically obsolete after the War, by new steamers; most of them, practically all of them, I believe, oil burners, but they didn't come; they were not designated for the New York line, they were designated for the Gulf and for the Pacific, but they could come to New York and I wanted to provide that I could get fuel oil for them in New York under the same price that I could get fuel oil for the passenger steamers, and I wanted to provide that I get that oil at Bayonne in case I wished to send any of the steamers over there, knowing practically—knowing absolutely that at this time I made this contract, those four steamers could not go over there; there was not a draft of water enough; there might have been later on a channel dredged deep enough for them, but the channel from my

own observation, from my knowledge, was deep enough for those steamers in case I wanted to send them.

Q. During the period represented by Taxpayer's Exhibit 1, or any extension thereof, did the French Line have any vessels in service in the intercoastal business?

A. Intercoastal?

Q. Yes?

A. In the United States?

Q. Yes?

A. A foreign steamship company can't do intercoastal business in the United States.

[fol. 104] All the business was entirely foreign commerce, is that correct?

A. Had to be, we couldn't touch it, carry any freight between ports.

Q. Now, so far as——

A. I will state however that we did once in a while send the steamer that was loaded—partially loaded at Norfolk, for instance, we sent it on to New Orleans to complete; she may have possibly had some oil in her, but they couldn't carry freight or passengers.

Q. But the same type of fuel oil that you purchased for vessels named in that contract could be used in any of those freight boats that you spoke of?

A. Well, if I had any freight boats that I wanted to send to another port, I would fill them with fuel and send them down there if the oil was cheaper here than Norfolk or Philadelphia.

By Mr. Goodgold:

Q. And although the contracts specified that fuel was to be used for these four steamers mentioned in the contract, you could divert that fuel oil for the use of other freight carriers?

A. Permit me to correct you; I don't think that the contract said that the fuel oil was to be specifically for these four ships. We named these four ships so as to indicate what our maximum requirements might be for those ships during the year, but there was also—the contract provided that we had a certain amount; now the present contract says four million barrels.

Q. But you were not limited by the contract to use the fuel oil purchased on these four steamers; you could use them in connection with other steamers or freighters?

[fol. 105] A. Oh, yes, under our contract with the Standard Oil we could use the oil on any ship that the company operated. I was particular to have it specify "operated," because at times during the War, I had a hundred ships under the British Flag; but they were not oil burners.

Q. As a matter of fact, you could use that oil for any purpose, whether it be used on any ships of the company or on freighters or you could even divert it for other purposes, could you not?

A. No, I could not use it for other purposes; I could only use it under the contract. They were only obligated to deliver me oil for the use of steamers of the French Line.

Q. Is there anything in the contract that says that?

A. Says that?

Q. Yes.

A. It says fuel oil for our use.

Q. As far as I can see from an examination of the contract, there is no limitation as to what ship or ships the fuel oil may be used?

A. Only ships employed in the service of the French Line, the original contract. Mr. Comptroller, the reason I put that 2,000,000 maximum supply was because the Standard Oil, while they agreed to give me all the oil I might use for the French steamers, for the boats employed by the French Line in service in New York, had to have a limit because I might have employed a hundred ships and they might have had to go to three or four million barrels, and they wanted to know their maximum. Every year, I think it was in October, on one of the contracts, or my agreement with them, was that I should notify them about my maximum quantity for the following year, so that when I made an extension of [fol. 106] the contract, the original contract extended with the Standard Oil of New Jersey, I stipulated four million barrels, because I was then contemplating that we were building a line of freighters which ultimately went to the Pacific, we were building passenger steamers like the Champlain, and we contemplated steamers like the Normandie in which case even with those steamers and the freight boats, 2,000,000 barrels wouldn't have been sufficient. Therefore, I stipulated at that time that they should make that maximum quantity 4,000,000, but I had agreed that a year before or October before for the current—for the next year, I would stipulate what quantity I needed or prospective needs, and it was stipulated.

By Mr. Burke:

Q. Were all of those negotiations about which you just testified as to the quantity of oil to be used from time to time, were all of those made in the City of New York?

A. All in the City of New York.

Q. And were they all embodied in the contract represented by Taxpayer's Exhibit No. 1 in Evidence or any extension thereof?

A. All, or in some verbal understanding which held good. As a matter of fact I tried to embody in the contract every possible contingency which might arise and this notification of the maximum quantity which I would need for the following year was based on our prospective sailing lists; and the number of voyages which each ship would make during the year, and the oil it would need each year, and I would figure this oil; but I might, in which case, it was understood that if [fol. 107] the Standard Oil could give me any one year, I notified them any one year "next year we need five million barrels" they would have the privilege of saying that "no, we won't give you that, not under the contract."

Mr. Goodgold: Will you try to give your answers specifically to the question asked; we don't want to have the record too cluttered up.

Q. Was all the business exclusively with the Standard Oil of New Jersey?

A. Exclusively.

Q. Do you know whether or not you could have purchased fuel oil from other companies here in the City of New York in a quantity to meet your demands?

A. To meet what demands?

Q. The demands of the French Line?

A. The Standard Oil always could meet the demands of the French Line under the contract.

Q. Now, I believe you testified earlier this morning that there had been various changes in the price of the fuel oil from the time the contracts were entered into up to the time you left the company; now when a change was made increasing the price of the fuel oil, your company was under no obligation to purchase from the Standard Oil Company of New Jersey, was it?

A. Yes.

Q. Only on the condition that you could not purchase it cheaper from a competitor, isn't that so?

A. We couldn't purchase from a competitor, we had no privilege of going outside, except oil was tendered to us by a responsible company less fifteen cents, or at 15¢ less [fol. 108] than the price agreed on, in which case I would have to ask Standard Oil of New Yersey; if they wanted to, they could meet that price and debar me from buying outside; if they didn't want to, then I could buy outside, providing always the market price was 15¢ higher than the price that was offered me by the other companies.

Q. Do you know if at any time during the life of the contracts, with the Standard Oil Company of New Jersey, whether the bonded fuel oil purchased from that company was delivered from a source of supply within the City of New York?

A. No, I suppose that all of it—to my knowledge, it all came from Bayonne.

Q. Do you know whether or not in each instance of delivery of oil by the Standard Oil of New Jersey, to your company, that the particular oil so delivered came directly from Bayonne?

A. According to my knowledge, it all came from Bayonne.

Q. You have no personal knowledge of that subject?

A. Of what subject?

Q. Of where the oil came from, outside of what you were told by someone? You wouldn't know, would you?

A. Outside of the bills, no, and outside of the changes in price which stipulated Bayonne, I knew of no oil being purchased outside.

Q. Do you know of any instance during the life of the contracts in question when barges of oil arrived in New York Harbor, awaiting the arrival of one of the French Line ships and spent any time at all in the Harbor awaiting the boat; do you know of any case like that?

A. No.

[fol. 109] Q. Is it possible that such could have happened?

A. No, I can't state what could have happened in the oil business.

By Mr. Goodgold:

Q. Let me put the question to you this way: Do you notify the Standard Oil Company of New Jersey when a ship is to arrive, and when to have the barge tanks ready?

A. Not to my personal knowledge, but I know that that is the custom, because it was arranged with me, and the

superintendent that they were to notify the Standard Oil of it; the Standard Oil had our list of sailings and knew the ships that were due; it was all stipulated, and they were to notify them of the quantities, and they notified usually in advance of the arrival of the ship of the number of tons they needed of oil; so that the Standard Oil could get ready to put the oil alongside the minute the ship arrived.

Q. Do the barges come alongside the steamer before—I will withdraw that question. Do the barges arrive in the harbors of New York prior to the arrival of the steamers in New York?

A. I don't know when the barges arrive.

Mr. Stockton: I would say——

Q. Your answer is that you don't know when the barges arrive in the ports of New York to fill the fuel tanks of the steamers?

A. When the barges arrive?

Q. Yes.

A. The empty barges?

Q. No, the barges with the fuel oil.

A. I don't know.

Q. You don't know?

A. I don't know.

[fol. 110] Q. As far as you know, the barges may arrive before the arrival of a ship or after the arrival of the ship?

A. As far as I know, yes.

Mr. Stockton: I may say that I am prepared to prove the exact method of deliveries.

Q. Mr. Cauchois, you were pretty well conversant with the market for fuel oil during the time you were employed by the company?

A. During the time that I occupied myself with the contracts for fuel oil, which was when oil began to be burned, 1920—something; before that it was all coal.

Q. Do you know whether other companies in the City of New York supplied fuel oil for use on steamers?

A. I don't know; I suppose they did.

Q. You say you were familiar with the market?

A. I was familiar with the market.

Q. Then you know what companies were selling fuel oil?

A. No, I was familiar with the market, I suppose there were other companies.

Q. You know there were companies like the Mexican Petroleum?

A. Yes.

Q. The Gulf Refining Co.?

A. Yes.

Q. The Texas Oil Company?

A. Yes.

Q. The Socony Vacuum?

A. Well, I don't know the Socony Vacuum.

Q. The Beacon Oil Company?

A. I don't know that company.

Q. The Richfield Company?

A. No. I know those three that you first mentioned because they tried to treat with me.

Q. That is right; those companies sold the same kind [fol. 111] of fuel oil as the Standard Oil Company of New Jersey?

A. I don't know what kind of oil they sold.

Q. You say you treated with them, you negotiated with them at one time?

A. They solicited from me a contract for the quantity of oil.

Q. And did they tell you they had the kind of oil you needed?

A. They told me they had a fuel oil; that is all I know.

Q. Is that fuel oil they sell any different from it? You are an expert, aren't you?

A. No.

Q. You negotiated contracts for the company throughout your career?

A. But I know nothing about the quality of the oil.

Q. You know nothing about the quality of the oil, and you know nothing about the market supply?

A. Of the market supply?

Q. Of fuel oil?

A. No. I know nothing except about the three, and I believe the Shell also.

Q. So your personal knowledge——

Mr. Stockton: Just a moment, he hasn't finished his answer; finish your answer Mr. Cauchois.

Witness: I know that there were those three companies that he mentioned; those and the Shell Company, were in

competition with the Standard Oil Company, and they made efforts with me to make contracts or split my contract to give them part of the Standard Oil contract, all of which for various reasons I refused, and treated entirely from the time I took the first barrel of oil with the Standard Oil Company.

Mr. Stockton: Do you mean the Standard Oil Company of New Jersey?

[fol. 112] Witness: Of New Jersey.

Mr. Goodgold: Will you tell us some of the conversations you had with representatives of these companies, with respect to the contracts they endeavored to get from your company?

Mr. Stockton: I object; I wish to object on the record.

Mr. Goodgold: I think we are entitled to get all the facts; I have given the taxpayer sufficient leeway in presenting his case; I think we are entitled to the same consideration; besides we ought to have all the facts on the record to show what the condition of the market was at the time, as to the source of supply, as to the market price, as to the quality of oil that could be had.

Mr. Stockton: I stand on the objection and take an exception.

Mr. Goodgold: All right, will you answer that question, please?

A. To my best recollection as to all my interviews with these companies that solicited part or all of my contract, the first thing was the price of oil would be the same price. As far as New York was concerned, I figured what I would pay the Standard Oil Company at Bayonne and what it would cost me to barge and would see if they would correspond. If they were too much, I would tell them it was out of the question.

Q. It was the same kind of oil?

A. I don't know if it was the same kind of oil, they told me fuel oil.

[fol. 113] Q. When you figured price?

A. What is that?

Q. When you figured price, it was fuel oil, was it not?

A. Well, fuel oil makes a great many grades, I have to test that oil, it shows the test.

Q. Is the quality of fuel oil specified in the contract, Exhibit No. 1?

A. No, but it was the quality that I knew the Standard Oil Company of New Jersey was furnishing for the motive power of the ship and which was satisfactory to me and my company.

Q. Would you say that the fuel oil furnished by the other companies was not the proper kind to propel steamers engaged in foreign commerce?

A. I don't know whether it would have been or not, that had to be tested, if they had given me any oil, and which was sent to Paris and confirmed as being proper by our engineering department.

Q. Do you know what qualities of fuel oil there are?

A. No, I don't know.

Q. You don't know anything about it?

A. I don't know the qualities; all I know is I took the bunker fuel oil of the Standard Oil of New Jersey, which I knew was satisfactory or would be satisfactory for the ships.

Q. In your capacity with the company as advisory counsel, do you not have knowledge of the fact that other steamship companies and other steamers engaged in foreign commerce were buying fuel oil from the Mexican Petroleum?

A. Yes, I do know it.

Q. You do know it?

A. Yes, sir.

Q. You know that that fuel oil could have been used for that purpose?

A. The fuel oil that they got I suppose could have been used or they wouldn't carry it.

[fol. 114] Q. You say you suppose; as a matter of fact, you know?

A. I don't know if that oil they bought outside was satisfactory to them or not; I hadn't the slightest knowledge; I had my reasons for contracting with the Standard Oil.

Q. What was the type of oil that you specifically needed to run your steamers?

A. I don't know that, to my personal knowledge; I know that I got the tests of the oil which we have a record of, and which is sent regularly to Paris, and they examine that, and I suppose if it is not satisfactory they would notify the superintendent.

Q. As a matter of fact then, as far as your personal knowledge goes, you don't know anything about quality of oil?

A. Not a bit.

Q. So, when you negotiated the contract, all you specified was for fuel oil?

A. Standard of New Jersey's fuel oil.

Q. You didn't know whether that fuel oil was any different from any other fuel oil furnished by any other oil company?

A. Not at all; there were other considerations why I made the contract with the Standard Oil. If you want to, I will bring out the reasons why I did it, at the same price—even if it was the same, I had reasons.

By Mr. Burke:

Q. Mr. Cauchois, would your testimony concerning fuel oil be the same concerning diesel oil; do you know anything about diesel oil?

A. I don't know anything about diesel oil?

Q. Were any other bids received by your company or offers to sell given to your company from other companies on diesel oil?

[fol. 115] A. Not to my recollection; we never discussed diesel oil because we took so little of it.

Q. Did you discuss it with any other companies besides the Standard Oil of New Jersey?

A. On diesel?

Q. Yes.

A. Not to my recollection; we were taking so little that it wasn't worth while to make a contract, but I told the company we had better have a contract in case we needed it, but the contract never stipulated any particular amount; it simply stipulated diesel in case we needed diesel oil. We used to take a little diesel oil but not much.

By Mr. Goodgold:

Q. After you held these negotiations with the Standard Oil of New Jersey, with respect to the sale of fuel oil, I take it that you discussed all the important conditions of the contract with respect to the sale of the fuel oil, and after you discussed these matters, you then entered into this contract, Taxpayer's Exhibit No. 1, is that correct?

A. That is correct.

By Mr. Burke:

Q. With respect to the extension of the other contracts in exhibit here, at or about the expiration of each contract, did you further discuss the conditions of the contract with representatives of the Standard Oil Company?

A. No, I simply asked them to renew all the conditions of the contract that was then expiring, with the exception of the quantities.

Mr. Goodgold: That is right?

Witness: That I might want, the maximum quantities I might want.

[fol. 116] By Mr. Goodgold:

Q. But you did have a conversation with the representatives of the Standard Oil Company with respect to the extension of the contracts?

A. Of course.

Q. And then the extended contracts with all the conditions were made and signed?

A. Yes.

Q. That applies to every contract up to the contract ending December 31, 1936?

A. Yes, sir.

Q. All the important terms and the conditions are expressed in this contract?

A. I presume all the important points, I don't know of any other points that came up in dispute afterwards, during the life of that contract; I didn't think there was any point on which we had to modify the contract.

Q. In every case under these contracts, the oil was delivered in the Harbor of the City of New York; at no time was any part of the oil delivered to the ships in Bayonne, New Jersey?

A. To the ships direct from Bayonne; the oil came from Bayonne and was subject to the market price, plus the barging.

Q. You don't know that of your personal knowledge whether they came from Bayonne; you assume they came from Bayonne?

A. Oh, yes, yes, but they stated the price.

Q. But at no time did the steamers of your company take the oil on board ship at Bayonne; in every case the oil was

delivered on barges in New York and placed on board in New York?

A. Absolutely.

Q. Are you competent to testify with respect to the quantity of oil shipped upon each order?

A. Shipped upon each order?

Q. Yes.

A. No.

[fol. 117] Q. You don't know anything about that?

A. I knew only after the oil was in the ship and I got the bills I would know, and keep a record which was furnished by the accounting department from the records of the Standard Oil of the number of barrels of fuel and the number of barrels of diesel that were delivered on each ship so that I could estimate how many barrels we took during the year, and see that I was within my limit and my average request.

Q. That is not my question, that is not in answer to my question; you are not competent to testify with respect to the quantity of fuel oil ordered each time?

A. Ordered each time?

Q. Fuel oil.

A. Ordered?

Q. Yes.

A. No, I don't know how much was ordered each time, I know how much was shipped each time.

Mr. Goodgold: We have no further questions with respect to this witness.

Mr. Stockton: I have some further questions in re-direct.

Re-direct examination.

By Mr. Stockton:

Q. Why was it that you favored the Standard Oil Company in making these contracts, Mr. Cauchois?

A. The particular reason why I dealt exclusively with the Standard Oil Company was that at that time they had barges, and I think were the only company that had barges, of, I think, about twenty to thirty thousand barrels, and as I take thirty or forty thousand barrels, I wanted my deliveries made in the largest bulk possible, because the other companies, while they had smaller barges and might have [fol. 118] delivered the oil, they might not have been able

to deliver the oil within the time limit. Sometimes the ships leave in twenty-four or forty-eight hours, and if I wanted thirty thousand barrels, and they delivered two barges of ten thousand each, and went back to get more, they might get delayed by a fog, and I couldn't get away. The Standard Oil, I knew they could always give me one barge of twenty thousand, which would have been sufficient, if it got there alongside, for me to get back to France without delaying my sailing. The others could not; because I have seen the harbor in such condition that they would not be able to move in the fog, and they wouldn't have been able to move from Bayonne in a fog.

By Mr. Burke:

Q. Mr. Cauchois, couldn't the other oil companies, the Mexican Petroleum Company and the others that you mentioned, have given you deliveries as you required?

A. At the time I was making the contract they couldn't agree to deliver me in a single barge sufficient quantity which would assure my voyage back to France and would assure me getting on board in time. If there was any delay or fog, I couldn't go.

Q. Was it essential that the oil be delivered in a single barge?

A. No.

Q. Why wouldn't two barges do as well?

A. They could send as many barges as they liked, but I knew that the Standard Oil Company had a barge sufficient for me. But if I made a contract with the other people, I couldn't stipulate that they had to give me one barge of twenty thousand if they didn't have it at that time; I don't know what they have now.

[fol. 119] Q. But there is nothing in the contract with the Standard Oil Company of New Jersey that says delivery will be made in one barge?

A. There was nothing, but I had the knowledge that they had barges larger than the other companies.

By Mr. Goodgold:

Q. Is that the only reason you didn't buy oil from the other companies?

A. That is practically the only reason that the Standard Oil, as far as that was concerned, if the other companies,

I don't know where they got their oil, but the reason I did for the Standard Oil——

Q. In other words, if the Mexican Petroleum, or the Gulf Refining Company over here in Staten Island, could guarantee you delivery in one barge or in several barges so that you would have sufficient oil for the use of a steamer, on a particular voyage, you would be satisfied?

A. No, that was one of the reasons.

Q. You said a minute ago that that was practically the only reason?

A. No, I didn't say that; I will correct myself; it wasn't practically, it was practically the reason but not the only reason.

Q. What other reason would there be?

A. What other reason for dealing with the Standard Oil?

Q. Yes, not for dealing with the Standard Oil but why you couldn't deal with the other companies?

A. Why, because if I split my contract, I would have to depend on two companies for my oil, whereas, if I dealt with the Standard Oil alone——

Q. You are not answering my question, you are reading something into my question that I didn't ask you. I asked [fol. 120] you this: If the Gulf Refining Company in Staten Island could guarantee you delivery in one barge or several barges of sufficient oil for a ship engaged in a particular voyage, wouldn't this fulfil your requirements?

A. I had reasons not to deal with them.

Q. What were your reasons other than——

A. I was trying to tell you; dealing with one company I was assured on their part of an effort in case of a shortage of oil on the market, at a certain period, that my ships should get my oil. Now the Cunard and White Star split their contract, they had two branches, and if they couldn't get from one they could depend on the other. I dealt with one because, supposing there was a shortage of Standard Oil of New Jersey oil here, they would give me for my steamer sufficient in preference, as I understand it, to the other lines. Knowing that the other lines had another opportunity to get oil and I didn't, they would give it to me. For instance, if the Standard Oil Company had thirty thousand barrels ready for delivery at the time three of the big ships, like the Aquitania, the Majestic and the Ile de France were here, and I needed twenty thousand barrels, they would give it to me; because they had another oppor-

tunity to get sufficient oil to go away, whereas me, if they only gave me a share of that oil that they had my ship would be tied up. Therefore it was better for me in my opinion to deal with one company who would assure me the oil and who, so as not to delay my ship, which was the vital thing——

Q. So as I understand it, your particular reason for dealing with the Standard Oil was because they could furnish [fol. 121] you with the oil in the quantities you desired?

A. And at the time we desired it.

Q. That is the only reason?

A. I don't know of any other reason.

Q. How big are the steamships engaged in foreign commerce under the flag of the French Company?

A. Well, the biggest ship we have is the Normandie, I think she is about 83,000 tons; the Ile de France is about 53,000.

Q. During the period from December 10, 1934, to December 31, 1935, how big were the ships during that period?

A. The Ile de France was the biggest one, about 53,000 tons.

Q. What was its capacity for fuel oil?

A. Well, that I couldn't tell you.

Q. You don't know; what was the capacity of the Paris for fuel oil?

A. Well, she was a little smaller.

Q. You don't know how big it——

A. I don't know the capacity of her tanks; I have a record of every voyage that she used to make.

Q. I know that, but I am asking you: you don't know the capacity of the Paris either?

A. Not in comparison with the Ile de France.

Q. By itself, what is its capacity?

A. I don't know.

Q. What is the capacity of the France?

A. I don't know unless I look back.

Q. What is the capacity of the De Grasse for fuel oil?

A. I don't know unless I refresh my memory by looking up my records.

Q. Were there any steamers in the employ of other companies, who had a capacity larger than the steamers I have just mentioned, to your knowledge?

A. Oh, there were some that had a capacity larger than the France and the De Grasse.

[fol. 122] Q. And would it surprise you to know that these companies engaged in foreign commerce purchased their fuel oil from companies other than the Standard Oil of New Jersey?

A. Why, no, I know it.

Q. You know it?

A. Certainly.

Q. So that there was a sufficient supply of fuel oil for the other ships?

A. I don't know that—of the other lines?

Q. Yes.

A. I don't know whether they were sufficient or where they got their oil, the other companies.

Q. The price quoted by the Standard Oil of New Jersey was not less than the price quoted by the other companies?

A. By the other companies?

Q. Yes.

A. I don't know.

Q. As far as I can make out from your testimony you are not conversant with any of the details with respect to the negotiations of these contracts, other than the quantity you asked for?

A. Well, if you stipulate what you mean by details.

Q. The questions I have asked you heretofore.

A. I have answered to the best of my knowledge; if I haven't answered that, it is because I don't know.

Q. As far as I can make out from your answers to the questions propounded, it is that you negotiated the contracts for the sale and delivery of a certain number of barrels of fuel oil; outside of that you have testified to nothing with respect to the various details, as to the capacity, available markets——

A. Capacity of what?

[fol. 123] Q. Quality of fuel oil, or any other details with respect to the purchase and sale of fuel oil.

A. I haven't testified to any knowledge of a difference in quality between the Standard Oil and any other company. I have testified as to the quantity, maximum, that they were obligated to give me.

Q. Only quantity?

A. Quantity.

Q. But you don't know anything about quality?

A. No, only the quality, as to the Standard Oil of New Jersey fuel oil, which I knew——

Q. What kind of fuel oil is that?

Mr. Stockton: Wait a minute, he hasn't finished that; he said "which I knew".

Witness: Which I knew is suitable for our ships.

Q. But you don't know what that quality fuel oil was?

A. I don't know.

Q. You don't know what quality of fuel oil that was?

A. Other than the specifications which they give us and which went over to our Paris office and our engineering department compared it with oil in the ship, that's all, and it seemed satisfactory.

Q. But you had no knowledge of what those were?

A. I had no knowledge of it, except that I saw the analysis.

Q. Was the quality of the fuel oil——

A. But it didn't mean anything to me.

Q. Was the quality of the fuel oil furnished by the Standard Oil of New Jersey from 1927 to the present time, that is, 1935, was it the same quality at all times?

A. I don't know that.

Q. You don't know that either?

A. I know that it must have been practically the same, because the company——

[fol. 124] Q. Well, I will have to strike that out, because you admit that you don't know whether they were or not.

A. No, I don't know.

Mr. Goodgold: Any other question?

Mr. Burke: No.

By Mr. Stockton:

Q. Now, just to straighten that out, Mr. Cauchois and to make that clear, you testified, did you not, that the analysis of the oil was sent to Paris?

A. Yes.

Q. Where is that analysis taken?

A. I don't know.

Q. Is it taken by your company?

A. Here?

Q. Yes.

A. I don't know.

Q. In other words you sent to Paris on the oil deliveries under these contracts an analysis of the oil?

A. Which was furnished us by the Standard Oil at the time, which I never compared and don't know whether the oil lived up to that or not.

Q. Yes, that was for Paris to determine?

A. Yes.

Q. And it was for the engineers on the ships to make their tests on the ships also?

A. I suppose so, I don't know.

Q. And to report to Paris?

A. I suppose so; I don't know what their instructions were.

Q. In other words, the quality of the oil was something that was not handled by New York at all and was checked up by Paris?

Mr. Goodgold: Mr. Stockton, he testified that he had nothing to do with it. I have it in the record several times that all he had to do was negotiate as to the quantity of [fol. 125] oil and the price. That is all this witness can tell us.

Mr. Stockton: I think he can tell us and has told us that the analyses are sent to Paris and passed on there.

Mr. Goodgold: He does not know that of his own personal knowledge.

Witness: I know that they were sent to Paris, I have seen them in Paris myself.

By Mr. Goodgold:

Q. Were the results of these analyses submitted to you?

A. No.

By Mr. Burke:

Q. Was a sample of oil sent over for an analysis on every delivery?

A. I don't know; you will have to ask the superintendent; not to my knowledge, as I understand it, there were certain samples, whether they were sent over on every ship, the superintendent could testify to that. He is the one who handles that, I don't handle that.

By Mr. Stockton:

Q. But you have seen in the Paris office these analyses that came from New York?

A. Oh, yes, I conferred with them on that subject.

Q. And it was Paris that passed on those analyses as to whether they were satisfactory or not?

A. Yes, I suppose they pass on that, I don't know; I never heard of any dissatisfaction.

Q. The contracts that you made here——

By Mr. Goodgold:

Q. You haven't any confirmation of any analysis, either?

A. It wouldn't come to me.

[fol. 126] By Mr. Stockton:

Q. The contracts that you made, which are in evidence, Mr. Cauchois, did you submit them to Paris and get authority to sign?

A. I submitted by cable the prices and the amounts that they were offering, the qualities, the duration of the contract, and they cabled back "accepted."

Q. And you didn't sign until you got authority from Paris?

A. Oh, no.

Q. The answer was "oh, no"?

A. Oh, no, Paris was conversant with every contract and every extension of contract.

By Mr. Goodgold:

Q. What was the authority communicated to you?

A. Price, duration and maximum quantity.

By Mr. Stockton:

Q. But if there were any other terms in the contract, you would summarize them for Paris?

A. But if there were any specific terms in the contract that I thought interested the Paris office, I notified them beforehand, before I accepted that; there were no conditions in that contract that particularly interested Paris, beyond the price, quantity, maximum, and some of these clauses where they permitted us to buy oil in the market, if they couldn't meet competitive prices.

Q. You are speaking of the fifteen per cent clause that you referred to before?

A. Yes.

Q. But those contracts were never signed by you until you had put those things before Paris and got their authority?

A. I put before Paris those things that I thought would interest Paris.

Q. Now, referring to Exhibit 8——

[fol. 127] By Mr. Goodgold:

Q. You never communicated to your company in Paris that fuel oil of that kind could be obtained from any other company?

A. Oh, yes.

Q. You have?

A. I have communicated to Paris the offers, all my discussions with the other companies, all of them.

Q. Did the company ever advise you not to buy their oil from any other company?

A. My recommendation was they should stick to Standard Oil, and the reason I gave and that was the end of it.

Q. The reasons you gave were the reasons you set forth before, and no others?

A. My reasons as I recollect them.

By Mr. Stockton:

Q. Now, referring to Taxpayer's Exhibit 8 in evidence, did you send that letter to Paris?

A. Well, I must have sent a copy of that letter to Paris.

Mr. Goodgold: I will have to strike that out.

Witness: There is no recollection in my mind whether I sent it to Paris or not; Paris office didn't usually go into the details of the contract. All they wanted was to know the principal points.

By Mr. Goodgold:

Q. Was there any limitation placed upon the Standard Oil Company with respect to the point from which the company could ship its oil; in other words could the Standard Oil Company obtain the oil from any source it saw fit [fol. 128] and ship it to you, providing the price remained the same?

A. Providing the quality was the same.

Q. Quality and the price was the same?

A. I couldn't dictate to the Standard Oil where they could ship from; all I could say was that I had a right to go to Bayonne.

Q. There is no question about it that you had no right to dictate to the Standard Oil Company from what source it was to ship its oil?

A. That is correct.

Q. The company was at liberty to ship the oil to you from any source from which it could obtain that oil, if the oil was of the same quality and the same price?

A. Providing it was the same quality as the Standard Oil Company of New Jersey Fuel Oil. That is all I asked; and the specifications to that effect were satisfactory to my company. Outside of that I didn't care how they did it.

Q. In other words, if they had facilities anywhere in the City of New York or any other place and had the same kind of fuel oil, they could ship that oil from any place they saw fit?

A. At the time I made the contracts, I knew their factories were in Bayonne; I knew they were in Bayonne, and I didn't care where they got the oil from; otherwise I knew it all came from Bayonne.

By Mr. Stockton:

Q. Now, with regard to the Compagnie Generale Transatlantique being incorporated in France, you said that it had a charter or permit from the State of New York; you don't mean that there is a New York corporation, do you?

A. No.

[fol. 129] Q. But only that it received authority—that the Compagnie Generale Transatlantique received authority to do business in New York?

A. It is a foreign corporation engaged in the——

Q. Engaged in business in New York City?

A. Yes, in the transportation of passengers and freight.

Q. In the transportation of freight and passengers between the United States and other countries?

A. Yes, and can't do any other business.

Q. When you testified in answer to Mr. Goodgold's question that you had carte blanche to make the terms of the fuel oil contracts here, is that to be understood as subject to your subsequent testimony that it was subject to authority from Paris to sign the contracts?

A. Yes.

Mr. Goodgold: I will have to strike that out; there is nothing in the contract that says it is subject to acceptance by the Paris office.

Mr. Stockton: That has nothing to do with it, Mr. Goodgold, the question is, did he sign his contracts before Paris authorized him to, and he says he never did until Paris authorized him. He said that several times before; I am simply making the record clear.

Mr. Goodgold: There is nothing in the record to show any authorization by the Paris office to Mr. Cauchois with respect to these contracts.

Mr. Stockton: There is Mr. Cauchois' testimony that he got authority from the Paris office to make the contracts.

[fol. 130] By Mr. Goodgold:

Q. In what form do you get that authority, Mr. Cauchois?

A. Oh, either in answer to a letter or cable I sent them.

Q. Are those letters or cables available in your office?

A. I don't know whether we keep those records now or not, but permit me, I don't think you should dispute my authority, the position I had, to make the contracts. There is no question as to the legality of the contract, as I understand it, involved, is there?

Mr. Stockton: Not at all. The only thing is that you submitted it to Paris and got their authorization before signing it.

Witness: Naturally.

Q. When did you submit it to Paris? How soon after you got the offer?

A. I don't know, mostly the same day, possibly the next mail, or possibly after I discussed it several times with them, and got down to facts and conditions, and I would send it over and I would also——

Q. How soon after you submitted it——

Mr. Stockton: Just a moment, he hasn't finished his answer. Finish your answer, Mr. Cauchois.

Witness: And waited for their answer before I would sign the contract, or an extension of the contract.

Q. How long would you wait? A. Well, I don't know.

Q. How long did you have to wait?

A. Well, it was only once with the Standard Oil that they put a limit for the renewal of the contract—the one ending [fol. 131] in 1936; they stipulated when I must give an answer, and I got them according to Paris' request to extend

that limitation, and they did, and before the expiration of the time, the Standard Oil allowed their offer to stand open. I accepted the contract.

Q. You were authorized to enter into contracts with the Standard Oil, were you not?

A. Oh, yes.

Q. And anything you did was binding on the Paris company?

A. Absolutely, I had the power of attorney for everything.

Mr. Goodgold: That's all.

Witness: Power of attorney for everything I did for the company.

By Mr. Stockton:

Q. I show you a copy of Taxpayer's Exhibit 9, the last paragraph, a postscript on page 2 of that exhibit. It says: "Under the conditions of your letter of October 14th, your offer was open until November 4th, but at my request you accorded a prolongation of the option until November 20th". Why was that extension stipulated?

A. How was what?

Q. Why did you ask that extension to November 20th?

A. Because the Paris office asked me to get the Standard Oil to extend their offer beyond November 4th, and I think I asked them to extend it up to December or up to the first of the year; I don't remember; and they finally agreed that they would extend it up to the 20th.

Q. That was for the purpose of your getting your authorization from the Paris office of the company to sign the contract?

A. They asked me to get that time of option extended, on [fol. 132] the prolongation of the contract, because I had asked to prolong it five years and they wanted to consider whether they would make the prolongation of the contract from 1931 up to 1936, and they asked to get the Standard Oil to keep this offer open until a certain date. I don't remember, it was beyond November 20th; and I conferred with the Standard Oil and they finally agreed to extend the date up to December—from November 4th to November 20th.

By Mr. Goodgold:

Q. All the dealings with the Standard Oil Company were negotiated by you?

A. Yes.

Q. And not by the home office?

A. And not by the home office.

Q. You did all the negotiating here in New York City for the home office?

A. What do you mean? I did the negotiation with the Standard Oil, but it was under authorization.

Q. That is correct, but as far as Standard Oil Company was concerned, they dealt with you exclusively?

A. Yes; they didn't deal with Paris, not for the New York contract; they had contracts——

Q. I am talking about the contracts here in evidence.

A. Yes.

Q. You mean they dealt with you exclusively?

A. Exclusively with me, and not with the Paris office, no, not with the Paris office.

By Mr. Stockton:

Q. But you didn't sign until you got authority from Paris?

A. No, no.

Q. And in this particular extension until November 20th, you did get authority before November 20th, did you not?

A. I did.

[fol. 133] Q. And that resulted in your execution of the contract, Taxpayer's Exhibit 10, contract of November 19, 1929?

A. It was a prolongation of the contract which expired in 1932, and they wanted me to prolong it up to 1936.

Q. Yes.

A. And I submitted it to Paris and Paris asked me to get them to extend it to November 20th—to January 1st probably.

Q. That is to extend the option of renewal?

A. Of giving them the contract, but the Standard Oil Company would not give them the extension as long as they wanted, but I got some extension out of them; I got 16 days' extension on it.

Q. That is an extension of the offer?

A. Extension of the offer; although Paris may have asked for 30 days or 60 days, I don't recollect which; but I got it up for 16 days extension, and prior to the expiration of the 16 days, I got authorization from Paris to close the contract, and I closed it on the 19th of November, extending it for five years, which is the present contract, or by which the present litigation is being governed.

Q. Now, as to freight steamers, have you ever operated freight steamers since this contract of 1927—for the year 1928 and up to date, have you ever operated freight steamers here that have gone over and taken the fuel from the Standard Oil at their piers?

A. No.

Q. You said that some new freight steamers were built?

A. Yes.

Q. And they operated to the West Coast?

A. To the West Coast and the Gulf.

Q. And they do not run to New York?

A. One of them comes to New York occasionally, to my knowledge. I saw her at the dock. She has a deep draught, and she took her oil here.

[fol. 134] Q. She fueled here alongside your dock in New York?

A. Yes.

Q. And the oil was sent here from the Standard Oil of New Jersey?

A. From the Standard Oil of New Jersey, it came from Bayonne.

Q. And did you during the time you were active up to January 1, 1934, Mr. Cauchois, ever use the fuel oil supplied you by the Standard Oil Company of New Jersey under these contracts, for any other purpose than your passenger ships?

A. Did I use them, or did the company after I left—what the company did?

Q. No, up to the time you left, did the company use this bunker fuel oil for any other purpose besides bunkering those steamers of your company?

A. I don't know whether they have used it or not. The excess of oil not being consumed, what they used it for or whether they did use it over there, whether they used it for the return, I don't know.

Q. "Over there"—you are speaking of Havre, France?

A. Havre.

Q. But as far as your oil here goes, you put it into your ships' bunkers?

A. In the Lafayette which is a diesel vessel, burning diesel oil for motive power—at times she would take a certain amount of fuel oil in addition to her diesel to be used for the donkey engines, electricity and so forth, whereas diesel oil is twice as dear as the other. If she had to use diesel for the engines she would, but for the electric lighting and washing of decks and the donkey engines, we used to take part diesel and part fuel. Now, how much of that fuel oil was left when she got over to France and what they did with it, I don't know.

[fol. 135] Q. But your bunker oil was all taken for either bunkers or for export to France?

A. Yes.

Mr. Stockton: That's all, Mr. Cauchois.

Mr. Burke: I have just one more question.

Q. When a boat docked here in New York Harbor, it was necessary to use winches of one kind or other to unload, was it not?

A. Yes.

Q. And how were those operated?

A. Operated?

Q. From the engines of the ship?

A. No, at present they are operated by, I believe, electricity, electricity from the city, but formerly at pier 57 they were from steam furnished on the dock which steam was supplied or made from coal.

Q. Well, was any of this diesel oil or fuel oil used in creating steam for the operation of these winches on board ship?

A. Oh, no.

Q. Was it used on the other side for that purpose?

A. Now, one minute, let me explain to you; I don't quite get your question right, or I will set you right; the winches are not used to put oil in the ship. Our agreement with the Standard Oil Company was free alongside, but they had to pump the oil into the ship and we had to give them steam, and that steam was purchased from the ship.

Q. What I had particular reference to was not the loading on board, but the loading of merchandise from the pier on the ship by use of hoists, etc.

A. Oh, yes, that was never done by fuel oil. On the new pier I think they used exclusively electricity from the city. The superintendent is more conversant with that, and [fol. 136] more competent than I; I have only an idea that on the pier we operated our lights and our heat and our power by electricity from the City, which you get from the City, but he will know that better. On the other pier I know that when I built that pier I installed the General Electric motors; they had to be fed by coal and we got the coal under our coal contract, but this contract was made for the oil way back in 1927 or something like that I believe; we never, up to the time we left pier 57, we never used any oil on the dock for power; we used coal, because that engine on the dock was made to burn coal. On the new pier it was a question of whether we were going to use steam generated from coal or generated from electricity.

Mr. Goodgold: I think you have sufficiently answered that question now.

Witness: And I believe it is all electricity and not steam, but never to my knowledge, I don't think we ever operated by power generated by oil.

MARCEL CASTELNAU, 200 West 15th Street, New York City, a witness called on behalf of the taxpayer, being duly sworn, testifies as follows:

Direct examination.

By Mr. Stockton:

Q. What is your occupation?

A. Assistant marine superintendent of the French Line.

Q. How long have you held that position?

A. I came to New York in October, 1933.

Q. And have you held it ever since?

A. Yes.

[fol. 137] Q. And what was your experience before that with the Line?

A. Well, I am master at sea, and I used to be chief officer.

Q. You have acted as chief officer in active service on the ships?

A. Yes, I did.

Q. So, you are familiar with the operation of the ships at sea?

A. I hope.

Q. And you know about the bunkering of the steamers?

A. Yes, though it isn't entirely in the jurisdiction of the chief officer, we have to know of it; that is in the hands of the chief engineer; he is the one who is fully accustomed to it.

Q. When we refer to the taxable period, Captain Castelnau, that will cover the period between December 10, 1934 and December 31, 1935?

A. Yes.

Q. During that period what steamers were operated by the Line to the Port of New York?

A. Well, we had——

Mr. Goodgold: To and from, correct?

Q. To and from?

A. To and from New York; well, we had liners, passenger ships to—that was the France, I think the France was in commission, I think she was still in commission at that time.

Q. In 1934? She went out of service in 1933.

A. I think she was.

Q. So she was not in service as late as December 10, 1934?

A. I don't think she was.

Q. The Ile de France was in service?

A. The Ile de France.

Q. The Paris?

A. The Paris.

Q. The Lafayette?

A. The Lafayette——

Q. The Lafayette came into service in 1930, did she not?

A. Yes.

[fol. 138] Q. And she is a motor ship?

A. Yes.

Q. And uses diesel oil?

A. Diesel oil.

Q. And the Champlain?

A. A steamship, using bunker oil.

Q. And she came into service about 1931?

A. Yes.

Q. The De Grasse you mentioned went out of service in 1934, I think in 1934?

A. Yes, she had been sent to Marseilles, she is now back.

Q. She is now back, in 1937?

A. Yes.

Q. But she went out of New York service before 1934?

A. Oh, maybe, I would not set a limit; I do not know; to be sure of those things, we should have the books with the dates each ship entered New York and left; it is very hard for me to say.

Q. But your recollection is that the Normandie, the Ile de France, the Paris, the Lafayette and the Champlain were ships operated during the tax period?

A. Yes.

Mr. Goodgold: The Normandie, too, did you say?

The Witness: The Normandie came later.

Q. The Normandie came into operation later; when?

A. In June, 1935.

Q. June, 1935, so that she was in operation during part of the tax period?

A. That is correct.

Q. Do you recall receiving instructions and the files from Mr. Cauchois when he retired from active service along in January, 1934?

A. Certainly; Mr. Cauchois gave me his files in Mr. Artur's office, and we were all in Mr. Artur's office and Mr. Cauchois gave me his files.

[fol. 139] Q. Did he at or about that time give you instructions which he has testified to, regarding the fuel oil contracts?

A. Mr. Cauchois was the only one in the French Line who knew about the contracts, and as I was to carry on after him, he explained to me very fully, as clearly as he could, all that he knows about it; all that, you understand, is about dealing with oil contracts, and not only on that day, but also at other times, as to the disposition of the French Line.

Q. During the tax period, you did not have to make any new contract for bunker oil did you? For bunker fuel oil?

A. No, those existing contracts were to carry along; the bunker fuel contract was expiring only on January 1, 1937, and the diesel oil contract was expiring in 1935; yes

—no, in 1936; that is it. The diesel contracts were expiring in January, 1936.

Q. I show you Taxpayer's Exhibit 14, that is the contract you referred to, is it not, that expires at the end of 1935?

A. No, that one was just a one-year contract.

Q. A one-year contract, wasn't it?

A. Yes.

Q. And it was made on or about its date?

A. That was made January 1, 1935, that was made by me.

Q. Made by you?

A. Yes.

Q. In other words you negotiated that contract?

A. Yes, I made it.

Q. And negotiated it with the Standard Oil Company of New Jersey?

A. With the Standard Oil Company of New Jersey; Mr. Connolly and Mr. Artur signed it.

Q. It was signed by Mr. Artur, was it not?

A. Yes, it was signed by Mr. Artur.

Q. Was that usual?

A. I think that is the only one that has been signed in [fol. 140] New York since I am in that occupation. I always took time, when we reached an agreement with the Standard of New Jersey; I merely notify them that I received cable from the Paris office that the terms and conditions are acceptable, and in order to make those things more right as they should be for the French Line, I have sent the copies to be signed by the general manager of the French Line in Paris. On this special occasion it may be that we had a special reason; we were late and we wanted to put a signature on that, and when I received a cable from Paris telling that all the terms of the contract were accepted, I got the assistant director to sign that, in order that it would be a regularly official contract to come into effect.

Q. So that it was signed by Mr. Artur in New York?

A. In New York, correct.

Q. Where are your offices, Captain Castelnau?

A. My offices are at the pier, they were pier 57, and now pier 88.

Q. And do you have any assistants in handling these fuel oil contracts, in the performance of them?

A. What do you mean by that?

Q. Do you attend to all the details of the deliveries of fuel oil yourself?

A. No, of course not, we can't.

Q. Who does that on the pier?

A. There is an employee in the office of the Marine Department, Touye——

Q. Touye?

A. Who is handling the clerical department.

Q. That is he receives the notices and papers from the Standard Oil Company of New Jersey?

A. At time of deliveries, yes.

[fol. 141] Q. At time of deliveries, and he attends to the checking of quantities when the deliveries are made?

A. The checking of quantities is made on the barge in the presence of somebody.

Mr. Goodgold: Well, I don't think that testimony is at all competent, if this witness is not attending to these details he should so state, and the one who is so attending to the details, if you desire his testimony, should be put on the stand and give his testimony. I think we are going too far afield from the regular rules of procedure as practiced in the courts of this state.

Mr. Stockton: I merely want to show the limits of this witness——

Mr. Goodgold: Well then let him tell us for the record what his duties are and stop there.

Mr. Stockton: That is what we are doing.

Q. Suppose you follow that suggestion and state what the scope of your duties are, state what your duties are as assistant marine superintendent?

A. On that line of bunkering?

Q. Yes.

A. Every time a contract is coming to expiration, I get in touch with different parties to whom we may be able to sign a new contract.

By Mr. Goodgold:

Q. What contract are you talking about now?

A. We are talking about oil contracts?

By Mr. Burke:

Q. There have been no new oil contracts since you took office, have there?

A. Oh, yes, there have been some, there have been some after that period—that one I didn't——

[fol. 142] Q. That is diesel oil, how about bunker fuel oil?

A. Yes, there has been one, we have a new contract beginning January 1, 1937.

By Mr. Goodgold:

Q. We are not interested in that.

A. That one is after.

Q. We are interested in the contracts that were in effect during the period from December 10, 1934 to December 31, 1935. You have not touched that contract, so far; the contract was in existence when you came into office, that contract was in effect?

A. Was into effect.

Q. And there was no change made on that contract?

A. No change made.

Mr. Goodgold: All right.

By Mr. Stockton:

Q. But you have as part of your duties the carrying out of these fuel oil contracts previously made, have you not?

A. Yes, I do.

Q. How are the deliveries made, by barge alongside the ships?

A. By barge; all deliveries are made by barge in New York.

Q. And the ships that you mentioned when receiving the oil have been alongside your several piers in New York?

A. Pier 57 or 88.

Q. Now, the barge comes alongside the ship, is that right?

A. That is right.

Q. And where do they come from, do you know?

A. They come from Bayonne.

By Mr. Burke:

Q. Do you know that of your own personal knowledge, where they come from?

[fol. 143] A. I don't know where the barges come from, but all the papers, all the invoices say from Bayonne.

Q. But you wouldn't know where the oil in those barges actually came from, would you?

A. Well, to the best of my knowledge we would receive Venezuelan oil. That is not specified, the contract calls for the Standard Oil of New Jersey to deliver fuel oil that is called "bunker C", and the Standard of New Jersey wouldn't be obligated to always deliver a certain type of oil because they might be short some time of a tanker or so. But we know that we always receive oil from Venezuela. Always that oil is of the same flash, same viscosity, and that is Venezuelan oil.

Q. Well, you know that the Standard Oil of New Jersey always delivers oil alongside your ships, but you don't know where the oil comes from?

A. We know, I wouldn't say always, we would say most of the time that the oil comes from Venezuela, from the Island of Aruba.

By Mr. Goodgold:

Q. You mean that is the original source?

A. The original source of the oil delivered.

Q. You haven't any personal knowledge of that, either?

A. That is more technical, that is very technical. I haven't followed it from Aruba; that is common knowledge; everybody says and states that we are supplied with oil from Venezuela.

Q. But you have no personal information that the oil you buy comes from Venezuela?

A. I have no proof of it.

Q. It was testified before that the oil you buy comes from Bayonne?

[fol. 144] A. I think it was proved that the oil is coming from Bayonne, as long as we received the invoices, when we receive the oil, the Standard of New Jersey sends us a bill, a kind of invoice with every barge and we also receive an analysis of the oil for every barge and the origin of the barge is mentioned; for instance, origin of the oil is always "mixed" for them.

Mr. Ficken: It is mixed fuel oil. It is mixed oil that might come from any place.

Witness: The origin of the barge is Bayonne, New Jersey.

By Mr. Stockton:

Q. That is, when you speak of the oil originating in Venezuela, or the Island of Aruba, it is your understanding

that it comes from there to the Standard Oil Company of New Jersey, at Bayonne?

A. Yes.

Q. And is then barged from Bayonne to alongside your ships?

A. Yes, sir.

Q. And with regard to what you are buying, I ask you to refresh your recollection from the first contract which was later extended, Taxpayer's Exhibit 1, as to what was to be the subject of the contract?

A. Standard Bunker Fuel Oil.

Q. And by that you understand oil supplied by the Standard Oil Company of New Jersey, from Bayonne?

Mr. Burke: It doesn't say from Bayonne. It just says bunker fuel oil.

Mr. Stockton: It says Standard Bunker Fuel Oil.

Witness: Standard Bunker Fuel Oil.

Q. That was your understanding?

A. We have no place to get it except from Bayonne.

[fol. 145] Mr. Goodgold: Let the witness state what his understanding is rather than tell him what his understanding is.

Q. Do you know where the installation of the Standard Oil of New Jersey is?

A. Bayonne, New Jersey.

Q. How do you know that?

A. Well, I have been walking once in a while through there; and all their publicity and papers and everything come from there.

Q. And have you ever been there yourself?

A. Not specially to investigate their plants.

Q. But have you ever been in their plants?

A. No, I have not been in their plants, but I have been motoring around there.

Q. Motoring around Bayonne, you mean?

A. Yes, I have been around there.

Q. Do you know they also have some installation at Bayway, New Jersey? Have you been down there?

A. No, I have not been down there.

Q. Did you make any change, Captain Castelnau, in the method of performance of this contract and the method of

making deliveries, from what Mr. Cauchois has described to us as going on before?

A. No, that contract was in existence; Mr. Cauchois was carrying that contract, and I merely kept on carrying the same contract in the same way.

Q. And everything was done in the same way so far as you know?

A. Yes.

Mr. Stockton: I will withdraw this witness at this point; I may need a few questions from him later, and we will call Mr. Ficken.

[fol. 146] Mr. Burke: Just a moment.

Mr. Stockton: Oh, you have some questions, I beg your pardon.

Cross-examination.

By Mr. Burke:

Q. Prior to the time that you succeeded Mr. Cauchois in his office, did you have any intimate knowledge of oils; do you know anything about oils or did you know at that time?

A. I knew what everybody would know.

Q. You knew that there were such things as fuel oil and diesel oil?

A. Certainly.

Q. But did you know anything about the content of the oil, the uses to which the oil could be put?

A. What do you mean?

Q. I mean do you know what the specific gravity of the fuel oil was, or sulphur content?

A. I wouldn't know that because I was not curious.

Q. You are not an engineer?

A. No.

Q. You are not a chemist?

A. I am not supposed to be, anyway; I could have been absolutely ignorant of those things before I took up that matter——

Q. And from the time you took up the matter have you made any study as to the various grades of oil?

A. Yes, of course.

Q. Do you know whether each delivery of oil from the Standard Oil of New Jersey that is brought alongside your ships in New York Harbor meets the same analytical tests every other delivery meets?

A. They are always the same grade within a very small limit, and we would have a very big complaint from the ships if it were not, because they would have to change the [fol. 147] burners; that oil would not act the same way.

Q. Are you the person at the French Line offices who notifies the Standard Oil to make delivery from time to time, do you do that?

A. No, I don't do it myself; Mr. Touye, to whom I referred already, is the one.

Q. How far in advance of the actual docking of one of your ships do you order the oil necessary for the next voyage?

A. The Standard of New Jersey, of course, would kick if without any notice we would ask delivery of six or seven thousand tons, but they know the schedules of the ships.

By Mr. Goodgold:

Q. Do you mean "tons" or "barrels"?

A. Tons. Sometimes it runs to 6,000 tons or more.

Q. You don't order by tons, do you?

A. We convert that into barrels, but you don't always have the same number of barrels in a ton. It depends on the gravity; barrels is the volume, the ton is the weight. Of course we don't order just by number; they make a delivery by the barge, on what it was in the barge, the barge is measured.

Q. You have heard testimony with respect to the various contracts in effect throughout the entire period? Have you not?

A. What?

Q. You have heard the testimony with respect to the contracts that were submitted here?

A. What?

By Mr. Stockton:

Q. You heard the testimony given today by Mr. Cauchois?

A. Yes.

[fol. 148] By Mr. Goodgold:

Q. Was there anything in those contracts that said anything about tons rather than barrels?

A. Those contracts are, I think, in barrels.

Q. There is nothing in any of these contracts?

A. The price is always figured in barrels, and the contract is written in barrels.

Q. That is right; there is nothing in this contract that says anything about tons?

A. No.

Q. It merely specifies a certain number of barrels of fuel oil?

A. The tons have nothing to do with the contract.

Q. So the gravity of the oil wouldn't make any difference there?

A. The gravity of the oil would make no difference in the barrels.

By Mr. Burke:

Q. Do you know of any instance where oil was held in barges of the Standard Oil Company of New Jersey in the Harbor here in New York awaiting the arrival of your ships?

A. I don't know and I don't think that is likely because that would mean demurrage for the barge.

Q. You don't know exactly what time the oil leaves Bayonne or any other point for delivery to the ships?

A. I think they put that on their invoice when they——

By Mr. Stockton:

Q. You don't know of your own knowledge, now?

A. No, no, we know that; they put down the time the barge left.

By Mr. Burke:

Q. Do you know anything about the movement of the oil [fol. 149] up to the time it reaches the side of the ship? You have no idea where it comes from, except what the invoices may tell you?

A. That's it.

Q. And the quality and quantity are the same thing, you only know what you are told about it?

A. The quantity and quality is also checked—the quality; we know the quantity——

By Mr. Stockton:

Q. Do you have a meter on board that will measure the quantity pumped into the ship?

A. No, we wouldn't be satisfied by it; all of those barges are calibrated, and the measure of it has been made by the customs, and there is blueprints of it. In every tank you put a gauge and measure every compartment of every tank on the barge; and then they come to the blueprints approved by the customs and the actual volume of the oil delivered is found; then after that there is a correction for temperature to be made.

By Mr. Burke:

Q. You take these calculations made by representatives of your Line and the Standard Oil Company of New Jersey as being accurate?

A. Yes.

By Mr. Stockton:

Q. And the bills are based on those calculations, are they?

A. Exactly.

By Mr. Goodgold:

Q. Are you familiar with the capacity of the tanks on the Ile de France?

A. Ile de France is a ship that can carry about 6,500 tons of oil.

[fol. 150] Q. How many barrels is that?

A. Figure about 6.3 barrels for a ton, that is an average.

Q. 19,500 barrels?

A. That is about 40,000 barrels.

Q. How many barrels to a ton?

A. About 6.3 or 6.4.

Q. That would be, depending on the gravity, that would be about 39,000?

A. Make it square, 40,000.

Q. What is the capacity of the steamer Paris?

A. The Paris would be less; the capacity of the tanks is based on what is going to enable that ship to do a certain mileage, to cover a certain distance and all the ships are about the same.

Q. You can't tell us what the capacity of the tanks on the Paris is?

A. They are not far from being the same thing, say about 6,000 tons.

Q. About 36,000 barrels?

A. About that.

Q. What is the capacity of the Champlain?

A. Certainly much less.

Q. How much?

A. To tell you that—I could not figure it now; I have that in my office; if I wanted to be sure——

Q. And what is the capacity of the Normandie?

A. Normandie, I know that is exactly 7,100 tons.

Q. In other words about 42,000 barrels, close to that?

A. About.

Q. Now, when these ships come into the Harbor of New York, they don't always come in with the tanks completely empty, do they?

A. They have to have something left in it.

Q. What is the quantity of oil they usually have in their tanks when they arrive in New York, I mean on the average?

A. Oh, that varies greatly, depending on the price on this side and on the other side; if the oil is cheaper in New York, [fol. 151] we sail from France with what we actually need for the crossing plus a safety margin; if the price is better on the other side we sail with full tanks.

Q. As I understand it, you buy from the Standard Oil of New Jersey if the price is in your favor; if it isn't you buy the oil in France?

A. We still have to buy anyway; because the tanks of the ships are not large enough.

Q. I understand that; but wherever there is a differential in price you take advantage of that differential and buy it in France?

A. Unless we may elect to—whatever profits we have—if that will enable us to carry a good freight——

Q. I am afraid I don't understand your last statement.

Mr. Stockton: The purport, I take it, is that if the freight is more valuable than the differential in oil he takes the freight rather than considering the cheaper oil.

Q. I think, considering everything, the freight and the price of everything——

A. That is, the running of a ship is a commercial proposition; you have to take advantage of the profits to be made.

Q. I understand that, but considering the price you paid for the oil, including the freight, if it is cheaper to buy it in France than to buy it in New York, you buy it in France, don't you?

A. Well, yes.

Q. You have made purchases in France during the period under review here?

A. Certainly.

Q. Exactly; now the oil that you buy in France, is it any different than the oil you buy in New York, from the Standard Oil of New Jersey?

A. Is it different?

[fol. 152] Q. Yes?

A. Some of the time, most of the time, a slight difference which our engineers know, and they know what precautions they have to take using the oil they have on the other side and the oil on this side.

Q. In other words, there is a difference in the quality of the oil you buy on this side and the quality on the other side?

A. We will not say quality, we will say "specifications."

Q. What do you mean by specifications, do you mean the gravity?

A. The difference is rather viscosity.

Q. Now then that oil that you buy in France is fit for use on your ships, is it not?

A. Yes.

Q. Have you made a study of the types of oil that can be purchased in New York City from companies other than from the Standard Oil Company?

A. Not very deep. The only company I have been more or less interested in the oil that they would be able to supply was the Shell.

Q. Shell oil?

A. And that oil you see has a viscosity much higher than the Standard Oil, and should we have to buy from the Shell, we could not buy what they usually deliver to some other ships, because that would depart too far from the actual viscosity we are accustomed to use on our ships.

Q. But you could buy from the Shell Oil, could you not?

A. Well, you can use every single company, of course, but that makes a change in the whole thing.

Q. Would you say that you could not use the fuel oil that is sold by the other companies to propel your ships?

A. It is always possible to use it; it is more or less good, that's all.

[fol. 153] Q. If you had to purchase oil from another company, would you be handicapped in any way with respect to the performance you can get from such oil?

A. What does that mean?

Q. I mean could you get the same satisfactory results?

A. We never tried; we never have tried so far.

Q. You don't know, is that it?

A. We have never been very far on the question; you have to find out.

Q. As a matter of fact, it is a matter of common knowledge that other steamship companies plying the high seas between New York, France and Europe, other ports in Europe, are buying their fuel oil from other companies than the Standard Oil of New Jersey?

A. Yes; there was almost a monopoly of the thing, but the fact that it was the only one to——

Q. That is not in answer to my question. Are the ships of the other steamship companies engaged in foreign commerce propelled in the same manner as some of your ships?

A. Very certainly.

Q. And they get satisfactory results from the use of oil purchased from companies other than from the Standard Oil of New Jersey?

A. Apparently, as far as they are concerned, they are satisfied, but we don't do it.

Q. Can you tell us how much you ordered to be delivered from the Standard Oil to your ships at one time?

A. How much we ordered at one time?

Q. To be delivered to your ships?

A. We have had ships coming in New York with almost no bunker fuel left and talking of the Ile de France, I was telling you that the capacity was 6,500 tons; it just happened that [fol. 154] that ship arrived in New York with only two or three hundred tons left, and we refuelled in full, 6,000 tons.

Q. Can you tell us how much oil is delivered to one ship by a barge?

A. The capacity of one barge? I don't know.

Q. And you don't know how many barges are required to make a delivery to fill your bunkers?

A. For those capacities, when we talk of 6,000 tons, most of the time means two barges.

Q. Do you know that there are other companies in the City of New York who are able to fill your requirements?

A. I don't think that any other company would be able to make the deliveries with the same guarantee that we receive from the Standard Oil of New Jersey.

Q. Possibly not the same guarantee, but they could make deliveries in the quantities required?

A. Why of course they might; you always make——

Q. And you could order enough from two or three companies in order to give you the quantity you want?

A. That would be bad again because if those companies would not deliver exactly the same grade or quality, so the ship would have in one tank one grade, and in another tank another grade, then it is going to give difficulty.

Q. What are the different grades of fuel oil?

A. Well, the viscosity may vary in it; also the flash.

Q. What does that mean? Just tell me what is the difference in the quality there?

A. It may not mean a difference in quality; it may mean a difference in the way the oil would burn, the same burner would not apply to all types of oil; there is a difference in the viscosity.

[fol. 155] Q. When this oil comes in under an invoice marked "mixed", how do you know what the make-up of that mixed oil is? It might have been a number of grades, mightn't it?

A. Oh, but the Standard Oil of New Jersey knows very well our requirements and always let us have within a very slight variation the same quality, the same viscosity.

Q. Then the Standard Oil is at liberty to mix its oil if it so chooses?

A. Well, that is what is called in the contract the assurance that we would always have oil which we can use in the same way.

Q. It wouldn't make any difference to you from what source the Standard Oil got its oil?

A. It would make a difference; we would find out; if we just received a small quantity you can't find out; but in the long run we would find out.

Q. That is not my question; my question is it would not make any difference to you from what source Standard Oil obtain its supplies, so long as you got what you ordered?

A. It would make a difference if the supply was not always from Venezuela, as I told you; because we would not have the same BTU's, we would not always have the same viscosity and so on.

Q. That is not my question; my question is, would it make any difference to you if the Standard Oil furnished you the fuel oil you wanted from any source other than Bayonne so long as you got the kind of oil you wanted?

A. Well, as long as we are operating a ship, the ship would run the same way if the oil would come from New Jersey or Camden.

Q. Or if it came from any place, it wouldn't make any difference?

A. The place it came from wouldn't make any difference.

[fol. 156] Q. You wouldn't care where it came from?

A. I don't know whether I would or not; we have to receive oil of that same specification, and that specification is always delivered to us, that comes to us from the Standard, comes from Bayonne.

Q. It wouldn't make any difference to you from what source you got it?

A. As far as the operation of the ship is concerned, it makes no difference at all.

Q. It makes no difference at all, and the oil is delivered to you in accordance with some of these contracts, f. o. b. or f. a. s., New York?

A. The contracts are always closed from Bayonne, and the barging is f. a. s. city.

Q. No, the price quoted to your company is the price including freight up to the point of delivery?

A. No, the price quoted to the company is a price at installation because we are at liberty to send a ship to installation to pick up the oil.

Q. Let me read you this from the contract, Taxpayer's Exhibit No. 1: "This confirms our agreement to supply the total fuel oil requirements for your vessels," and names the vessels, "at New York over the year 1928, maximum quantity 2,000,000 barrels, "Standard" Bunker Fuel Oil, the price to be our market price date of delivery with guaranteed maximum price of $1.715 per barrel delivered by barge to your steamers". That price includes the delivery charge?

A. That one, yes.

Q. And the subsequent contracts, also; contract dated October 19, $1.50 per barrel delivered by barge to your steamers?

[fol. 157] Mr. Burke: October 19, when?

Mr. Goodgold: 1927.

A. I remember very well Mr. Cauchois telling me that he included that Bayonne proposition in order to enable

us in case we would have freighters to save that 5¢ barging, and——

Q. That is not my question. Now, your contract dated November 9, Taxpayer's Exhibit No. 5, November 19, 1927, the price per barrel was $1.40 per barrel, delivery by barge to your steamers. There is no extra charge for any freight, it is all included in the price per barrel?

A. That is the old contract.

Q. Those are the contracts that are in evidence now?

A. These are the contracts; they state definitely——

Q. I am merely elaborating on what was already introduced in evidence; the contract dated January 5, 1928, Taxpayer's Exhibit 7, the price per barrel is $1.40 delivered by barge to your steamers in New York. And your contract dated November 19, 1929, Taxpayer's Exhibit 10, the price is $1.45 per barrel delivered which means that also includes the freight. Now then——

A. No, the billing is always made by separating the barging.

Q. Just a moment. Following up these statements, it would make no difference to you so far as the price is concerned, if the oil you desire for use on your ships is delivered by the Standard Oil Company from any source whatever?

A. I don't think there would be a big difference.

Mr. Goodgold: That's all.

[fol. 158] By Mr. Stockton:

Q. In other words, if Standard Oil Company had its installation plant in New York instead of New Jersey, where it is, you wouldn't mind?

A. I don't know if we would mind or not, but so far as the operation of the ship is concerned—of the boiler is concerned, it makes no difference——

Q. But as you have explained you contracted to get "Standard" bunker fuel oil, did you not, as shown on this Exhibit 1?

A. Yes.

Q. And that is what you were regularly getting?

A. Standard bunker fuel oil, yes, that——

By Mr. Goodgold:

Q. Yet you cannot tell us what Standard bunker fuel oil is?

A. Well, first——

Q. You can't tell us what kind of an oil that is; you can't tell us what the quality is?

Mr. Stockton: I object to that statement; he has testified that it is different from that shipped by the Shell, by the Gulf——

Mr. Goodgold: He doesn't tell me anything insofar as letting me know just the type or quality, the kind of oil that Standard bunker fuel oil may be; it may be different from other oil, but he doesn't tell me the kind of oil it is.

Mr. Stockton: I suggest that the Comptroller read the record when he gets it because he will find it very carefully explained by Captain Castelnau as to why he wanted the oil of the Standard Oil Company rather than the oil of the other companies.

Mr. Goodgold: The record, as I remember it, and I re-
[fol. 159] member it very clearly, specifies that it contains a certain viscosity; now he doesn't tell us what percentage or what volume or what the characteristics are that make it different from other fuel oils, so far as we know.

Mr. Stockton: He said that the viscosity was greater in others and that made it less adaptable for French Line ships.

Mr. Goodgold: But that doesn't tell me anything yet.

Mr. Stockton: Well, if he perhaps read you the analysis——

Witness: We were not insisting; though it is not specified in the contract, we know, everybody knows in New York that most of the time oil delivered by the Standard of New Jersey is oil from Venezuela and that is what we want; we are very much satisfied with it, and we want to have it.

By Mr. Goodgold:

Q. Well, there are all kinds of oil delivered from Venezuela, aren't there?

A. That is so.

Q. This is not the only type of oil from Venezuela? And your contract does not call for delivery from Venezuela?

Mr. Stockton: I object.

A. Our contract does not call for it, but when we close the contract, those are the things we know.

Mr. Stockton: I object to the line of questioning, because it is perfectly obvious that the French Line could make a contract with some other company; but I don't see any [fol. 160] purpose in trying to sell the French Line oils from some other companies during this hearing.

Mr. Goodgold: I am not trying to sell the other companies' oil; I am just trying to find out does it not differ from the oil furnished by other companies; he hasn't been able to tell us what the difference is if there is any at all.

Mr. Stockton: He made a very clear statement as to the viscosity, as to the adjustment of the burners on the ship.

Mr. Goodgold: That in itself doesn't tell us anything, Mr. Stockton.

Mr. Stockton: I don't think anybody else can then.

Mr. Goodgold: I have no further questions.

By Mr. Stockton:

Q. You have received from the Standard Oil Company an analysis, you say, with each delivery?

A. Each delivery.

Q. And is that analysis ever sent to Paris?

A. Well, some have been sent to Paris; when there is a claim by the chief engineer, who says he has not received the proper oil, immediately the purchasing department sends an analysis and so on.

Q. At the time the Normandie went into operation, there was special care taken to see the workings of the oil in her burner?

A. Yes.

Q. So that the analyses were sent to Paris then?

A. Yes.

Q. And is it Paris who approves the analyses—are you operating under authority from Paris about the analyses?

A. Paris approves them.

[fol. 161] Q. Paris approves the analyses of the oil?

A. The technical staff of the French Line is in Paris and every time we have a change we refer the analysis to Paris.

Q. So, when you were operating under the bunker fuel oil contract, it was under an analysis previously approved by Paris?

A. Under specifications approved by Paris.

Mr. Goodgold: I don't see how this witness is competent to testify to that.

Mr. Stockton: It is part of his duty to carry out the performance of this end; he knows that he cannot accept the oil unless it has been approved by Paris; that is part of his duty.

Mr. Goodgold: But the contract is already there.

Witness: If there was a new contract, there was a new analysis; I cabled that along, all the details of the analysis of the oils. That was presented in Paris.

By Mr. Burke:

Q. Are the analyses furnished each time a cargo of oil is delivered alongside your ship?

A. Yes.

Q. And you immediately cable Paris?

A. No; when the analysis is just the same as any other one, almost no difference at all, that would be having in mind just to give profits to the cable company.

By Mr. Goodgold:

Q. You say there is an analysis of the oil made in Paris? [fol. 162] A. Eventually, if Paris has questions, they will sometimes tell us to send them samples.

Q. Just how does this analysis business operate; do you order oil for example from Standard Oil to be delivered at your ship?

A. Yes.

Q. Now, then, when is the analysis of the oil made; is it made when the oil is delivered and put into your ships?

A. The Standard of New Jersey makes its own analysis at its tanks. When the oil arrives, directly we look at the analysis before the oil would be accepted, and so we rely on the analysis of the Standard of New Jersey when they are——.

Q. In other words, if they made analyses and found it didn't meet your requirements, they would not ship you the oil, is that correct?

A. They would not do it. They would ship us what we, for us, call Standard Bunker Fuel Oil, which is conformed to what we want to receive.

By Mr. Stockton:

Q. And your engineers keep a check on the oil delivered?

A. Oh, they are making an analysis; they make a check.

Adjournment declared until 2:30 P. M.

Hearing resumed at 2:30 P. M.

MARCEL CASTELNAU, recalled, testifies as follows:

Direct examination.

By Mr. Stockton:

Q. Captain Castelnau, these passenger steamers that come in here and are bunkered, how long do they stay in [fol. 163] port on an average; I am talking now of the taxable period?

A. Average? Different on each ship. The Paris is usual to come in on Tuesday and sail on Saturday; the Champlain arrives on Thursday, sails on Saturday, the Lafayette arrives on Wednesday and sails on Thursday. The Normandie always arrives sometime on Monday around noon or before; and sails around Wednesday noon. It is different on each ship. Sometimes it will be 24 hours, sometimes 48 hours.

Q. Sometimes 24 hours, sometimes 3 or 4 days?

A. Yes.

Q. And how much bunker fuel oil do these ships consume while in port?

A. Well, if you want to consider it the consumption of the ship, or the main engine of the—while in port, we may say, depending on the ships, that it uses a maximum of 20 tons a day.

Q. And how many tons per day do the ships use when in full operation crossing the ocean?

A. Depending on the ship, we would say a thousand tons or eleven hundred tons a day for the Normandie, 600 tons for the Ile de France, not much less for the Paris, which is less economical; then the Champlain is around 350 or 400 tons a day.

Q. Can any of those ships take on a sufficient amount of bunker fuel oil at this port for a round trip?

A. No, no, I told you in the morning sometime that the Ile de France—that the maximum capacity is 6,500 tons; if she is using 600 tons a day, that is doing the best on it, and we still have to have at least ten per cent margin to be kept on board, and the Ile de France crosses in six days, [fol. 164] that means 12 days' full operation, when she can carry a maximum of only ten or ten and one-half days; the Normandie is bigger than that——

Q. What is the Normandie's capacity?

A. 7,100 tons

Q. So that on every trip they bunker to a greater or lesser extent at Le Havre, don't they?

A. Those ships always bunker on both sides; we may of course, elect to take the lesser quantity on one side or on the other side, depending on the price, but anyway there is a minimum we have to take in every case.

Mr. Stockton: That's all.

By Mr. Burke:

Q. Just a moment, Captain Castelnau, how long does it take to bunker a ship here in New York for the return trip?

A. Depending on the quantity you are taking.

Q. Let us take the Ile de France, how long will that take?

A. A very good barge will deliver, I think—stop me if I am wrong, a very good barge will deliver about 300 tons an hour.

Q. And that is all pumped through one hose? 300 tons an hour?

A. 300 tons, one hose; if you have two barges, the way they do that—two deep barges, and each barge is using one hose.

Q. It is possible then to load oil from two different barges alongside at the same time, is it not?

A. That is what we have to do.

Q. As a general rule?

A. Yes.

Q. So that if any of the other oil companies in the City of New York, whose barges are not of capacity that you testified to this morning, that the Standard Oil Company's [fol. 165] barges are, if they were to supply you with oil, they could always do so?

A. Yes, they could, but I call your attention to the fact that you have to connect, disconnect and shift barges; each time you are changing barges you are losing one or two hours; that means there is 3-4-500 tons on each connection; if you were using smaller barges, it would require you a much longer time than using larger barges, which once they are alongside the ship, will remain until the ship is fully bunkered.

Q. Let us take this for an example, clarify this: in case one of your ships comes in on Wednesday and sails on

Saturday, how soon after it docks at the pier, are the barges brought alongside to refuel them?

A. Depending on the arrangements we have made with the oil company, because when we bunker a ship we are using the off-shore side of the ship.

Q. That's right?

A. And that is all right if we just have bunker barges, but we also have to use derricks, and so we cannot afford to have that one side of the ship blocked by oil barges when we also need that for cargo.

Q. Do you load that at various times whenever it is convenient to put in the oil barge; is that the idea?

A. We have to go into the business before the ship arrives. We make the arrangement with the oil company, we say "we are willing to have your barges such a day, such a time," and then in the meantime you have the arrangements to receive the cargo, unload the cargo, if you have to use the derricks on the outside of the ships, they all have to match.

Q. It would be possible, would it not, for your ships to be properly refueled by using a number of oil barges, by furnishing——

[fol. 166] A. Each time we could use any kind of a barge, even a truck, with thousands of trucks; each one truck makes hundreds of tons, but it would take some time.

By Mr. Goodgold:

Q. As long as they get it loaded in time for you to sail, that is sufficient?

A. Yes, but it should not interfere with freight activities; just bunkering is not the whole thing; that is just one part of the activities of the ship.

By Mr. Burke:

Q. But even where the ship turns around in 24 hours the refueling is so arranged that it will not interfere with the freight cargo, isn't that so?

A. But in that time when the ship leaves in 24 hours, we have not enough cargo to be bothered about.

Mr. Burke: That's all; all right.

Mr. Stockton: That's all, thank you.

FRED W. FICKEN, recalled, as a witness on behalf of the taxpayer, testifies as follows:

Direct examination.

By Mr. Stockton:

Q. Mr. Ficken, I think you already stated that you were familiar with these contracts between the French Line and the Standard Oil Company of New Jersey for bunkering their ships?

A. I think I did.

Q. And that you are really in charge of the carrying out of those contracts?

A. That's right.

[fol. 167] Q. For testimony along that line I will have to get a little more fully your experience and the scope of your duties. Will you please tell us when you first came with the Standard Oil Company and just trace your career with it briefly?

A. I joined the Standard Oil Company of New Jersey in November, 1908; as an office boy; and graduated through different positions of junior clerk, and senior clerk into the position in 1926 as assistant manager of the fuel oil department.

Q. Now what are your duties as assistant manager of the fuel oil department?

Mr. Burke: I think he testified to that last time.

Mr. Stockton: He gave them last time.

Mr. Burke: He said negotiate fuel oil contracts with the marine industry, is that the full answer?

Witness: That is right.

Q. No, I want to get the full scope of your duties there and your responsibilities, because we have a different line of questioning to pursue.

A. The solicitation of marine fuel oil business is my principal duty; connected with that duty is to see that the contracts after they are made are satisfied, and by satisfied I mean so that at any time if any questions come up with respect to quality, quantity, any deviation from the terms of the contracts as written in the contract, or any change that might be made that those subjects are placed before me; any change for instance that might be made in the method of determining quantities or routine as to rec-

ords that may be kept with respect to marine business. [fol. 168] That is all put before me for my approval or disapproval.

Q. Now with particular reference to the making of deliveries under contracts of this sort, is it the regular course of the business of the Standard Oil Company of New Jersey to have records kept or made of these various steps of deliveries of the oil?

A. Oh, yes, records are kept, beginning at the time of the receipt of an order intact; all records kept of the procedure followed in fulfilling such an order until its conclusion or until its delivery is concluded and made, which final record of course is the invoice and prior to that the delivery receipt and the records that the refinery has kept, which are sent here to New York, with respect to barge loadings.

Q. And is it part of the regular course of business of the Standard Oil Company to have those records kept and preserved?

A. Yes.

Q. And in your department with regard to deliveries, are those records kept in your department or elsewhere?

A. In my department.

Q. And how long have you been familiar with that regular course of business?

A. Since 1919.

Mr. Goodgold: We don't know yet what the regular course of business is.

Mr. Stockton: We are just showing so far that it is the regular course of his business to make memoranda.

Q. Can you describe to us the memoranda or records which show the course of the order for and delivery of bunker fuel oil to steamships in the regular course of business which you have described to us?

[fol. 169] Mr. Burke: You mean a general description, Mr. Stockton, do you?

Mr. Stockton: Yes, first a general description of the various steps that are taken and the records that are made regularly in the business of your office.

Mr. Goodgold: Why not take a typical transaction all the way through.

Mr. Stockton: I will excuse the witness therefore and ask Mr. Hammel to the stand.

ALBERT J. HAMMEL, 6250 Saunders Street, Rego Park, Long Island, a witness called on behalf of the taxpayer, testifies as follows:

Direct examination.

By Mr. Stockton:

Q. What is your occupation, Mr. Hammel?
A. Shipping clerk.
Q. Employed by whom?
A. Standard Oil Company of New Jersey.
Q. And working in what offices?
A. Ordering and shipping division.
Q. Located where?
A. 26 Broadway, New York City.
Q. How long have you had that position?
A. About two years.
Q. Will you give us the date when you were promoted to that position?
A. Well, I know it was in August, 1935.
Q. And before that what position did you hold?
A. Well, I was at that time, let's see; I was statistician.
Q. Also working for the Standard Oil Company of New Jersey?
A. Also, yes, sir.
[fol. 170] Q. And in what department?
A. Ordering and shipping.
Q. In other words in the same department in which you are now shipping clerk?
A. Same department, yes, sir.
Q. And as such did you have to do with the deliveries of oil?
A. Yes, sir; I was connected with them at that time, worked hand in hand with the shipping desk.
Q. In a sense you were assisting the shipping clerk at that time?
A. No, but at times I would go there when he was out and work at his desk, try to pick up the job as much as possible.
Q. Now, what are your duties as shipping clerk?
A. As shipping clerk I receive orders from the trade, make arrangements to bunker the vessels by barge or at our refinery; at the same time I make arrangements regarding supplying of bunker fuel with our manufacturing

department and also maintain various records in the office.

Q. Now you heard Mr. Ficken testify that it was the regular course of business of the Standard Oil Company of New Jersey, the shipping—of the fuel oil sales department to make records of the delivery of oils under contracts?

A. Yes, sir.

Q. And that those records were made in his department?

A. Yes, sir.

Q. In whose charge are they?

A. They are in my charge.

Q. How are they kept, in files?

A. In files, yes, sir.

Q. Have you produced at my request a series of those records made with regard to a delivery of bunker fuel oil to the Compagnie Generale Transatlantique?

A. I have.

[fol. 171] Q. And those records are with regard to the delivery to what ship on what date?

A. The Paris.

Q. And on what date?

A. December 12.

Q. What year?

A. 1934.

Q. And that is the first delivery that was made to any of the French Line ships or the French Line under their fuel oil contract with your company?

A. It was——

Q. Just a moment, in the period December 10, 1934 to December 31, 1935?

A. It was, yes, sir.

Q. Is that a typical delivery under those contracts?

A. Yes.

Q. Will you hand me the group of papers which you described—you have done so?

A. That is right.

Q. Now I show you a paper headed "Order No. 6504" dated December 11, 1934, and ask you what that is?

A. That is an order received from the French Line to supply the steamer Paris with fuel oil commencing December 12, 10:00 A. M.

Q. That is on the printed form and is filled out in pencil?

A. That is the original form; in other words the order is given to me, is entered on that slip.

Q. Is that a record of the order that comes in from the French Line to the Standard Oil Company of New Jersey?

A. Yes, sir.

Q. And is that made in the regular course of business of the Standard Oil Company of New Jersey?

A. Yes, sir, in the regular course of business.

Q. Kept in accordance with the usual course as described by Mr. Ficken, as you heard a minute ago?

A. Yes, sir.

[fol. 172] Mr. Stockton: I offer that in evidence, as proof of the transaction thereon noted.

By Mr. Burke:

Q. Was this prepared by you personally, this order, or was this before your time?

A. That was before my time, yes, sir.

Q. This is typical of all those that have taken place since you have taken over your shipping duties?

A. That is the regular form, routine.

Q. In all cases?

A. Yes, sir; in other words that form is where you carry out the——

Q. How would an order like that come to you, over the telephone?

A. Over the telephone, yes, sir.

Mr. Burke: All right, no objection.

Mr. Goodgold: Why don't you wait until you get them all together and offer them as one exhibit.

By Mr. Stockton:

Q. I show you a paper dated 12/11/34, from the Standard Oil Company, order No. U-6504, and ask you what that is?

A. This is a typical written form of the original ticket, that is already submitted. This is handed—the original ticket is handed over to the typist who in turn draws up the order; there are four copies, one office copy, one accounting copy, and two refinery copies, which of course are sent down to the refinery for their records.

Q. May I interrupt; by "original ticket" you mean original order 6504, referred to a minute ago?

A. Yes, sir.

Q. Go on, what does this show?

A. This particular form would show the number of bar-
[fol. 173] rels actually delivered to the ship, in other words, a barge out-turn.

By Mr. Goodgold:

Q. The order would not show the actual number of barrels?

A. I in turn would show that on the order, so that we could send that down to the accounting department, keeping a copy for ourselves, of course. They in turn would bill out on the figures as shown on the order.

Q. Don't you have delivery tickets?

A. Delivery tickets, that is it exactly, the thing is this, of course: we have the regular barge receipt, the fuel oil receipt.

Q. That would indicate——

Mr. Stockton: I don't want to get ahead of him, otherwise we will get confused on this; I think we will do better offering these in evidence piece by piece, particularly, if there is to be cross-examination each time.

Mr. Goodgold: I am not exactly cross-examining the witness, because he is talking about an order in the first place and then as a delivery ticket——

Mr. Stockton: I want to have it so that I can refer to it; so if you will mark that in evidence.

(Order No. 6504, received and marked Taxpayer's Exhibit No. 16 in Evidence.)

Mr. Stockton: Then this—did you have some more questions on this, Mr. Goodgold?

Mr. Goodgold: I am not going to cross-examine; I just
[fol. 174] want to straighten him out because he talks about an order ticket and then all of a sudden about a delivery ticket.

By Mr. Burke:

Q. On this typewritten order, there are written in pencil "so many barrels." Are those your figures?

A. Exactly.

Q. And when were those written in, after the oil is delivered to the ship?

A. Yes, sir.

Q. And then where do you get those figures, from the barge ticket?

A. From the barge receipt, the fuel oil receipt which I mentioned before.

Mr. Stockton: In other words, to explain these step by step, I ask to have this marked.

(Received and marked Taxpayer's Exhibit No. 17 in evidence.)

By Mr. Stockton:

Q. Going back a minute and referring to Taxpayer's Exhibit 16, this pencil here is the entry of the telephone order, is that right?

A. Yes, sir.

Q. In this case the Compagnie Generale Transatlantique?

A. That is correct, yes, sir.

Q. And this is your consecutive order No. 6504?

A. That's right.

Q. The date is stamped on, the date you received the telephone call?

A. Yes.

Q. And the word "B A Y O", what does that mean?

A. Bayonne.

Q. That is where it is coming from?

A. That is taken to mean Bayonne.

[fol. 175] Q. And what does "route" mean here, 12/12—10 A. M.?

A. Well those forms are also used for tank cars.

Q. The word "route" doesn't apply here?

A. No, we are using it just as a convenient space to enter the date.

Q. The date and time is the date and time you are to make delivery?

A. Exactly.

Q. And the quantity speaks for itself; what is this stamp "ship bonded oil"?

A. Indicates the vessel was eligible to receive bonded fuel oil; therefore the order is placed accordingly.

Q. Then from that you say—did you want to see that?

Mr. Burke: Just a second; finish your question now, I want to ask him about that.

By Mr. Burke:

Q. Mr. Hammel, when a telephone order comes in for fuel oil, what do they tell you they want; how is the order placed?

A. First thing of course is the name of the vessel.

Q. Right.

A. The next is the pier, next is the quantity, and the next is the date and time.

Q. Is that all they tell you when they call?

A. That's right; of course they specify the grade of fuel but—that is what they do, the grade of fuel, yes.

Mr. Burke: All right.

By Mr. Goodgold:

Q. How do they specify the grade of fuel, bunker "C" or "C" fuel?

A. Correct.

[fol. 176] By Mr. Stockton:

Q. And what do you understand by the word "bunker C" or "C fuel" when they come in to your company?

A. I understand that that is, well, bonded fuel, because as I mentioned before the vessel is eligible to receive bonded fuel.

By Mr. Goodgold:

Q. Is that all it means, bunker fuel?

A. Yes, sir.

Q. Is there any difference as far as quality is concerned?

A. As far as quality is concerned, I would say no.

By Mr. Stockton:

Q. And does it mean Standard bunker fuel oil?

A. It means Standard bunker fuel oil, yes, sir.

Q. Now referring to Exhibit 17, I understand you to say that the typewritten portion here is made up from the pencilled notation made on Exhibit 16?

A. Yes.

Q. That is copied into this form that you have described?

A. That is right.

Q. But the pencilled notation appearing as here 12/12-11—14,881.86 bbls., and 14-122—10225.33 ditto, when is that put on?

A. That is added after the fuel oil receipts are received.

Q. And the fuel oil receipts are only received after delivery has been completed?

A. After delivery has been completed.

Q. So those are made subsequently to the time that this paper is made up?

A. Yes, sir.

Q. Then as you describe this was made up in five parts and do you send any of those to the works?

A. Yes, sir, two copies.

[fol. 177] Q. And here the works are noted as what?

A. Bayonne.

Q. So two of these went to Bayonne, is that right?

A. Yes, sir.

Q. And they constitute the order to the works to supply that much oil?

A. Yes, sir.

Q. That is the amount in typewriting here, 26,520 barrels, as to which there has been a correction written in, has there not?

A. Yes.

By Mr. Burke:

Q. Is that the first indication that the works have of any order being placed, the receipt of two copies of that?

A. No, sir, no.

By Mr. Stockton:

Q. What do they get first?

A. Well, the first procedure would be to let them know that such and such a barge would be down there to load such a quantity; that barge is given to us by our lighterage department, of course. I in turn pass it on to the refinery, ask them to load a barge with that quantity.

By Mr. Goodgold:

Q. How does the lighterage receive notice?

A. By a form.

By Mr. Stockton:

Q. I produce the form, entitled "Standard-Vacuum Transportation, Lighter Order, U6504", is that the form you referred to?

A. Yes, sir.

Mr. Stockton: I offer that in evidence.

By Mr. Burke:

Q. Is this form also prepared by you?
A. Yes, sir.

[fol. 178] By Mr. Stockton:

Q. And I might say that where you are saying that you prepared this, as to deliveries prepared before you became delivery clerk, they were prepared by your predecessor?
A. Yes, sir.
Q. But in the same regular routine?
A. Yes, sir.

Mr. Burke: No objection.

(Lighter order received and marked Taxpayer's Exhibit No. 18 in Evidence.)

By Mr. Goodgold:

Q. Is the Standard-Vacuum Transportation Company a separate and distinct company from the Standard Oil of New Jersey?
A. It is.
Q. It is?
A. Yes, sir.
Q. And the relationship exists merely between that company and the Standard Oil Company of New Jersey insofar as this transaction is concerned?
A. That's right.
Q. When this company does the lightering for the Standard Oil of New Jersey, whom does it bill?
A. Standard Oil of New Jersey.
Q. It does not bill the French Line, does it?
A. It does not, no, sir.

By Mr. Stockton:

Q. Now this Exhibit 18 is filled out the same day and close to the time that you have received the original order, is it not?
A. Yes, sir.

Q. And you telephone them or do you send this slip over as the first notice to the Transportation Company?

A. I usually telephone as to the large orders.

[fol. 179] Q. And then fill out this slip and send it how, by hand?

A. By hand, yes, sir.

Q. That Standard Vacuum Transportation Company is an affiliated company, is it not—strike that out. I withdraw that question. Now on this you have also the stamp "ship bonded oil" for the same reason that you described before?

A. Yes, sir.

Q. And you have here a stamp "Standard Bunker Fuel Oil", that refers to the Standard Oil Company's own bunker fuel oil?

A. Yes.

Q. I notice that the form says "Have lighter at" and there is a blank not filled in; how would the transportation company know where to send the barge on receipt of this?

A. Well, we have been working together so long that they know of course just where to load the barge.

Q. And where would that be?

A. Constable Hook, Bayonne.

Q. So that you didn't need to fill that in in order to convey the order to them, in order to have the lighter at Constable Hook, Bayonne, New Jersey.

A. That is right.

By Mr. Burke:

Q. Has your company any tanks any place elsewhere besides Bayonne?

A. Yes.

Q. Carrying a stock of bonded fuel oil?

A. No.

Q. They stock fuel oils that are not bonded?

A. Yes, sir.

Q. And where are those works?

A. Bayway, New Jersey.

Q. And is Bayonne the only place that stocks bonded fuel oil?

A. Yes, sir.

[fol. 180] By Mr. Stockton:

Q. You have furnished another paper headed "Memo for Mr. George Jones, Export Department, U6504," and dated 12/11; what is that?

A. That is information passed along to our managing department to make arrangements for the delivery of bonded bunker fuel to the Paris.

Q. And what arrangements have to be made, who does he have to make them with?

A. They make arrangements at the customs for the withdrawal of that oil.

Q. From the bonded fuel tanks?

A. Yes, sir, bonded fuel tanks at Bayonne.

Q. And does Mr. George Jones of the Export Department have charge of that?

A. Yes, sir, it is his sole duty.

Mr. Stockton: I offer that in evidence.

Mr. Goodgold: No objection.

(Received and marked Taxpayer's Exhibit 19 in Evidence.)

Q. And that is sent over to Mr. Jones; he is also at 26 Broadway?

A. He is also at 26 Broadway.

Q. And that is done the same day, and close to the time that you got the order and sent out with the other papers that you mentioned?

A. Yes, sir.

Q. Do you know what "drawback oil" is?

A. Drawback oil—my conception of drawback oil is oil which is rather, say, crude, which is brought into our refinery from a foreign country and refined there at our refineries.

Q. And then if furnished to a foreign ship or for export, it is entitled to a drawback of duty?

A. Yes, sir.

[fol. 181] Q. That is, duty is paid on the drawback oil, but is never paid on the bonded oil?

A. Yes, sir.

By Mr. Burke:

Q. The drawback oil is oil brought in from a foreign country to your refinery and refined there; then does it become fuel oil suitable for steamship use?

A. Yes, sir.

Q. With bonded fuel oil there is no custom duty on that?

A. Bonded fuel oil, no sir.

Q. Now when fuel oil comes in to your refinery from Venezuela, is there a custom duty paid on that?

A. I don't know.

Q. You don't know whether there is?

A. I think Mr. Ficken would be in a better position to answer that.

Q. Then your description of drawback oil, is that accurate, to your knowledge?

A. I am quite certain, it is, yes, sir.

Mr. Stockton: We will bring out further facts from Mr. Ficken, on the record.

By Mr. Stockton:

Q. But have you, has the Standard Oil Company drawback oil at Bayway?

A. Yes, yes, sir.

Q. I produce a file of papers and I ask you if there is any one of these several sheets that covers the order U6504, which we have been tracing?

A. U6504, yes, sir.

Q. You point here to this particular page headed "Date December 12, 1934"?

A. That is right.

Q. And indicate the second line, the second space of that, as covering this order U6504?

A. Yes, sir.

Mr. Stockton: I offer that in evidence.

[fol. 182] By Mr. Burke:

Q. Who makes up this sheet?

A. I do, sir.

Q. It is part of your duties to make this list of shipments?

A. Yes, sir.

By Mr. Stockton:

Q. What do you call that sheet?

A. Fuel oil layout.

Mr. Burke: No objection; you just want to introduce that one page, don't you?

Mr. Stockton: Yes.

(Received and marked Taxpayer's Exhibit No. 20 in Evidence.)

Q. Now that fuel oil layout constitutes your daily record of deliveries to the various companies?

A. Yes, sir.

Q. Or record of your orders for deliveries, I should say, because up to this point the delivery has not yet been effected, has it?

A. No, oh, no.

By Mr. Burke:

Q. When is that entry made?

A. The entry is made immediately after our receiving the order.

Q. Immediately after you take that telephone order?

A. Yes, sir. First of all I make up my lighterage ticket and my bonding ticket and I enter the order on the layout.

By Mr. Stockton:

Q. In this instance the layout page in evidence 20, is dated December 12, 1934, so that was the next day from the day you received the order?

A. That's right for delivery on December 12, the order was received on December 11.

[fol. 183] Q. And the date indicates the date on which delivery is to be made?

A. Is to be made, yes, sir.

Q. So that was also made up on the 11th, at the time the other papers were made up?

A. That is right.

Q. I show you this paper headed "Barge Loadings, Standard Fuel Oil, date December 17th, 1934, Refy. Bayonne," and ask you what that is?

A. That is a record sheet sent up by our Bayonne Refinery, indicating the amount of oil delivered to these barges from our shore tank; they represent our shore tank figures.

Q. Now, that's not made up in your office at all, it is made up at the refinery in Bayonne?

A. Yes, sir.

Q. And have you been to the Bayonne Refinery?

A. Yes, I have.

Q. And are you familiar with the process there of loading the barges?

A. I am, yes, sir.

Mr. Stockton: I offer this in evidence.

By Mr. Burke:

Q. Is this sent directly to you from your refinery?

A. Directly.

Q. Comes right to you for your records?

A. Direct.

Q. And is kept by you under your supervision?

A. Yes, sir.

Q. Do you make any entries on this at all, yourself?

A. I do.

Q. What entries do you make?

A. The barge out-turn figures, in other words the figures as taken off the fuel oil receipt.

Mr. Burke: All right, no objection.

(Received and marked Taxpayer's Exhibit 21 in Evidence.)

[fol. 184] By Mr. Stockton:

Q. And where are the figures showing the actual delivery which you take from the barge receipts?

A. Right alongside the "total in barge".

Q. In other words, in the sixth column on the left?

A. That is right.

Q. And the only entries that are made in ink on that form, those are made by you from the barge receipts?

A. That is right.

Q. So that here the words "Paris, 10,225" cover barge 122, do they not?

A. Yes.

Q. In the execution of this order, there were two barges, is that right?

A. Two barges, yes, sir.

Q. What numbers?

A. 11 and 122.

Q. I show you another sheet and ask you if that is the barge loadings sheet from Bayonne, the same date, showing the loading of barge 11?

A. Yes, it is.

Q. And there again your figures in ink are your only entry on that and are made from the barge receipt, is that right?

A. Yes, sir.

Mr. Stockton: I offer the other barge sheet in the same form.

(Received and marked Taxpayer's Exhibit No. 22 in Evidence.)

Q. Now with regard to these Exhibits 21 and 22, the first column indicates what?

A. The date, date loaded.

Q. And the next column indicates what?

A. The barge we shipped.

Q. The third column on Exhibit 21, indicates what?

A. The third? The amount of oil in the barge before loading.

[fol. 185] Q. In other words in that exhibit is a statement that there was oil in this barge before the refinery loaded other oil in that same barge, is that right?

A. That's true.

Q. And this shows as the heading indicates the amount of oil that was in the barge before the loading of the barge was completed at Bayonne?

A. Yes, sir.

Q. In 22, that is barge 11, that indicates the barge was empty before loading, does it not?

A. Yes.

Q. And then the next column, the fourth, the figures on Exhibit 22 of 14628.24, what does that show?

A. That is the amount loaded from the shore tanks.

Q. And how do they arrive at that figure there?

A. They take the gauges of the barges before and after loading.

Q. Is that figure also checked at Bayonne with the tank calibration?

A. Yes, sir.

Q. So that those are the number of barrels shown by the Bayonne refinery figures to have been in the barge when it left there for the Paris, is that right?

A. Yes, sir.

Q. I notice that your figures from the receipt vary from that, being 14,881.86, do you know what would account for such a variation?

A. The only reason I could see for that is the fact that there must have been some oil in the barge before loading, which was not shown in that column.

Q. Would there be a differential of that sort accounted for by the expansion of oil due to heat or temperature?

Mr. Burke: Does he know the tendencies of oil or whether it would expand or would not; can he testify to that?

[fol. 186] Witness: Yes, sir.

Mr. Stockton: I can bring that out by this witness or leave it to Mr. Ficken.

Witness: I am no chemist, but after all, it is common sense, I have a little of that, I hope.

Mr. Burke: A lot of people don't know it.

By Mr. Stockton:

Q. The figure "total deliveries" over to the right, means the total deliveries from the refinery, does it not; that doesn't reflect the amount of deliveries here except by addition?

A. Well, that column there is really not used for that, Mr. Stockton; they use that column there to indicate the test of the oil.

Q. I see, on both these exhibits?

A. Yes.

Q. In both these Exhibits 21 and 22, then the last column "total deliveries" shows the test of the oil?

A. Yes, sir.

Q. Do you know what the three figures are?

A. Yes, sir.

Q. Here on Exhibits 22, 155, 230, 65?

A. They indicate the gravity, flash and viscosity.

Q. And the same on Exhibt 21, except that it is not shown here?

A. No, that is not indicated there.

Q. That is not shown for the Paris?

A. That happens to be a shut-out, therefore we are not interested in that.

Q. The viscosity and the flash of that was already taken before?

A. Yes, sir.

By Mr. Burke:

Q. Let me ask you before you go on, as to these barges in [fol. 187] which there is oil at the time the additional oil is

loaded for transportation to the ship, what kind of oil would that be?

A. It would be the same grade of oil, sir.

Q. Same grade?

A. Yes, sir.

Q. What would be the reason the barge is partially loaded?

A. Because some ships have shut outs, in fact it happens in a great number of cases, a vessel can't take as much oil as that order called for.

Q. And——

A. Other times it is taken back and pumped out.

Q. Would the same grade of oil have the same gravity, the same flash point, as the oil subsequently loaded out?

A. For within the bunker "C" fuel oil specifications.

By Mr. Stockton:

Q. I show you a paper and ask you what that is?

A. That is the barge fuel oil receipt.

Q. Those represent the quantities delivered by the barge into the ship, and that is marked Standard Oil Company of New Jersey, fuel oil receipt, barge No. 11, and is that the record of the same oil which we have been following here, loaded on to the Paris?

A. It is, yes, sir.

Mr. Stockton: I offer that in evidence.

By Mr. Burke:

Q. Who makes this up?

A. That is made up by the barge captain.

By Mr. Stockton:

Q. And is that made up by him in the regular course of his duties?

A. Yes, sir.

Q. And how does it come to you?

A. It comes to me through the lighterage department, [fol. 188] who, in turn, pass it on to me; it is passed on to them by the barge captain or the inspector who happens to be on the job; they in turn pass it on to me.

Q. And all that is in the regular course of business?

A. Yes, sir.

By Mr. Burke:

Q. How often does he make an entry on the slip like that? There are a number of entries, does that consist of one shipment of oil?

A. Yes, yes, sir, it does.

Q. And what is the purpose for the number of entries—are there different tanks on the barges?

A. That is it exactly.

Q. Divided into compartments?

A. Yes, sir.

Q. And as each one is emptied, the record is made?

A. Yes, sir.

By Mr. Goodgold:

Q. What is the difference between the viscosity shown on the Taxpayer's Exhibit 21, and that shown on your barge captain's receipt—for example, the viscosity shown on the Taxpayer's Exhibit is 65, and that shown on the captain's receipt is 62?

A. Do you mind if I take a look at that, sir? There is, yes.

Q. There is a discrepancy?

A. There is, yes, sir.

Q. Nevertheless, it was accepted and used, is that right?

A. That is right.

By Mr. Burke:

Q. It meets the specifications nevertheless, whether it is 62 or 65?

A. That is right.

Q. It falls within the general classification acceptable to the French Line?

A. They would let us know soon enough if it was not acceptable.

[fol. 189] Q. 62 is of a lower viscosity than 65?

A. Yes, sir.

Q. Whose figures are those, the barge captain's?

A. Those?

Q. Yes.

A. I believe they are put on it by the—sometime they are put on by a foreman and they are given to the barge captain and he in turn takes them down.

Mr. Stockton: I offer that in evidence.

(Received and marked Taxpayer's Exhibit No. 23 in Evidence.)

By Mr. Stockton:

Q. Referring again to 23 in evidence, what are the signatures here in the lower right hand corner?

A. The signature represents that of the chief engineer, the other side our inspector.

Q. The chief engineer, is the chief engineer of the French Line ship?

A. Of the Paris.

Q. Of the Paris; and the inspector is here called "gauger", isn't he?

A. Why, yes, that is what he really is; he checks over the figure with the chief engineer and the barge captain.

By Mr. Burke:

Q. Does the customs officer make any entry on that?

A. No entry.

Q. On that barge ticket?

A. No, none at all.

By Mr. Stockton:

Q. I show you two papers headed "Standard Oil Company of New Je v, Fuel Oil Receipt, Barge No. 122", and ask you what t .. are?

A. Those represent a fuel oil receipt, barge fuel oil receipts, I'll say, on barge 122.

[fol. 190] Q. There are two papers together?

A. That is right; one represents the quantity loaded and the other represents the shut-out.

Q. The shut-out is the amount which you described on a previous exhibit as being the amount left in the barge before it is loaded?

A. The amount returned to the refinery.

Q. So that there were two receipts here, one for the amount of oil actually taken in the Paris and the second which has on it "U6504" in a circle, which represents oil shut-out by the Paris and left in the barge, is that right?

A. Yes, sir.

Mr. Stockton: I ask to have those marked in order, 24A and 24B.

By Mr. Burke:

Q. Do the barge captains deliver these receipts to you, these particular receipts, I mean have them delivered?

A. That is right.

Q. And are they kept in your possession?

A. They are, well, we keep copies and naturally a copy is sent along to the French Line.

Q. From those tickets your pencil notations on the first typewritten order are made?

A. Yes, sir.

Mr. Burke: No objection.

(Received and marked Taxpayer's Exhibits 24A and 24B.)

Q. Mr. Hammel, the first loading of oil in this loading about which you testified was on December 12, is that correct?

A. December 12.

Q. And the second loading was made on December 14?

A. That is correct.

[fol. 191] Q. And the ship Paris was at its pier in the City of New York on December 12, 13 and 14, isn't that correct?

A. Yes, sir.

By Mr. Goodgold:

Q. And it may have been there subsequent to the 14th?

A. Subsequent to the 14th?

Q. Yes.

A. No, sir.

Q. Did it sail after the 14th?

A. I don't know when that vessel sailed, you see.

Q. It is possible that it was here some time after the second loading on the 14th?

A. That is possible.

By Mr. Stockton:

Q. Now do those Exhibits 16 through 24B constitute a complete and perfect record showing a delivery of oil from the Standard Oil Company of New Jersey to the French Line?

A. They do.

Q. And as you said that is all kept in the regular course of business as to each delivery in the same way?

A. Yes.

By Mr. Goodgold:

Q. What happens after you get the barge captain's receipt?

A. After we receive the barge captain's receipt?

Q. Yes.

A. We make the entry on our order, our copy, also the accounting department copy.

Q. And then what?

A. Then the accounting department copy, of course, is forwarded to the accounting department, who, in turn, make up the invoice from that order.

Q. The invoice merely shows the quantity and the price delivered on a certain date, the quantity of oil and the price?

A. The quantity, price, ship, pier, all information per-
[fol. 192] taining to the delivery.

By Mr. Stockton:

Q. Is the invoice kept in your office or in the accounting department office?

A. That is kept in the accounting department.

Q. And is anything else sent to the ship or to the company?

A. Yes, sir.

Q. What?

A. We arrange to send a test-letter, so-called test-letter, to the Line which shows the date, barge, refinery and test pertaining to that order.

By Mr. Goodgold:

Q. After you have delivered it in the hold of the ship?

A. Yes, sir.

Q. And after the ship has sailed?

A. No; well, we make it a point, in fact the French Line insists that we have that letter in their hands before the vessel does sail so that the chief engineer, as I understand it, may have a copy.

By Mr. Burke:

Q. Well, is that test letter required by the contract that your company has with the French Line?

A. No, I am not in a position to answer that.

By Mr. Stockton:

Q. Is it regularly sent in the performance of that contract, is it sent as a regular routine matter?

A. A regular routine matter, yes, sir.

Mr. Stockton: I will excuse Mr. Hammel for a minute and ask Captain Castelnau to take the stand again.

[fol. 193] MARCEL CASTELNAU, recalled, as a witness on behalf of the taxpayer, testifies as follows:

Direct examination.

By Mr. Stockton:

Q. Captain Castelnau, you have heard the testimony of Mr. Hammel?

A. Yes.

Q. Do you in the regular course receive a test letter from the Standard Oil Company of New Jersey?

Mr. Burke: Wait a minute, excuse me for interrupting. Would that come to the Captain or go to the chief engineer directly?

Witness: That comes to the office first and then later goes up to the chief engineer. We receive it and deliver it right to the chief engineer.

By Mr. Stockton:

Q. I show you a letter dated December 14, 1934, on the letterhead, 26 Broadway, and ask you if that is a test letter?

A. This is the regular test letter.

Q. And that is in regard to a delivery to the S. S. Paris?

A. S. S. Paris.

Q. On or about December 14, 1934?

A. That is dated December 14, 1934, that is after the delivery has been made; you have two supplies coming, coming from the same place, that letter will cover both deliveries.

Q. That shows the date December 12, and one December 14?

A. That is right.

Q. Those are the deliveries as to which we have been talking?

A. I think so.

Mr. Stockton: I offer that.

[fol. 194] (Letter received and marked Taxpayer's Exhibit No. 25 in Evidence.)

Mr. Goodgold: I think you ought to let the papers speak for themselves; I have been very patient, but let the papers speak for themselves, rather than the witnesses speak for the papers.

Mr. Stockton: In some instances they are not very clear themselves.

By Mr. Stockton:

Q. This Exhibit 25 you received in the regular course of business, and is it the regular course of the Standard Oil Company of New Jersey under your contract with that company to send these test letters?

A. We receive on every delivery.

Q. Is it important to you to receive it?

A. Well you have just been told that; that thing is to be used by the chief engineer.

Q. That is not yet on the record, it was told, but off the record?

A. Yes, sir.

Q. And you also receive the invoices or bills?

A. Yes, these come in——

Q. Those come in later, do they not? Later than the test letters?

A. Well the test letters and the invoice comes in with the receipt of the chief engineer and all those people you have been talking about, do not show anyone of them exactly what we will actually be billed; we are paying for the volume at a certain temperature; certain variations of temperature,—but you were talking not long ago of 62 or 63 degrees. That is not viscosity; that is temperature. When the barge loads in Bayonne it may be 62 degrees, when the barge unloads [fol. 195] on to the ship, it may be 65, and the temperature has to do with the volume; so we are paying for the volume at a certain temperature specified in the letter.

Q. So that these computations or bills come in later?

A. Yes, they are very big.

Q. These two I show you at December 12, 1934?

A. They are for deliveries to the Paris from barge 11 and 122, on December 12 and 14, 1934.

Mr. Stockton: I offer them.

(Received and marked Exhibits 26a and 26b in Evidence.)

Mr. Stockton: I will withdraw Captain Castelnau and recall Mr. Hammel.

ALBERT J. HAMMEL, recalled, testifies as follows:

Direct examination.

By Mr. Stockton:

Q. Mr. Hammel, at my request, have you gone through papers similar to the set of papers Exhibits 16 to 24B with regard to each and every of the deliveries in chronological order commencing December 12, 1934 to and including December 24, 1935, to the French Line ships?

A. I have.

Q. And have you made up a statement? Was December 24, 1935 the last delivery made in that year?

A. Yes.

Q. To the French Line ships?

A. It was.

Q. And is the statement you made up showing the date and number of the order, the vessels, the barge making the delivery, the refinery from which the delivery was made and the quantity or the number of barrels and the same for [fol. 196] the diesel fuel oil deliveries, commencing with the first delivery December 12, 1934 and ending with the last delivery December 24, 1935, have you made up such a statement?

A. Yes.

Q. And on the diesel oil is that the first and last deliveries in the taxable period?

A. Yes, yes, sir.

Q. And the same for the fuel oil, those are the first and last deliveries?

A. Yes.

Q. That is a complete statement, is it, of all those deliveries, showing those facts?

A. It is.

Mr. Stockton: I offer that.

Mr. Burke: Thus far we have had no testimony so far as the question of the diesel fuel oil is concerned. Are we to assume that it comes from the same place under the same conditions and is handled in the same way?

Mr. Stockton: I can bring that out in a moment.

Q. As to the diesel fuel oil, Mr. Hammel, is there any difference between the diesel fuel oil and the bunker fuel oil with regard to the deliveries and the records that you have described?

A. It is handled in the same manner, except, of course, well you have draw-back diesel and you have domestic diesel. We have had occasion to make a few drawback diesel oil deliveries there, if you notice, and in that particular case we make out the same kind of drawback form that we make out on drawback bunker "C" fuel. Outside of that they are handled in the same way.

Q. In other words, you don't get any bonded diesel oil?

A. No bonded diesel oil, at least I have never had occasion to handle such an order.

[fol. 197] Mr. Goodgold: Are you offering this in evidence?

Mr. Stockton: Yes.

Mr. Goodgold: No objection; will you mark that please.

(Statement received and marked Taxpayer's Exhibit No. 27 in Evidence.)

By Mr. Goodgold:

Q. The testimony which you have just given relates to a typical transaction of oil which is ordered and delivered to the ships of the French Line, is that correct?

A. Yes.

Q. It does not, it isn't the same in every case where delivery of oil is made to the ships of the French Line?

A. As regards to what, sir?

Q. With respect to the point from which shipment is to be made, is it?

A. The same in every case.

Q. Yes?

A. Well now——

Q. In other words the shipment is not always made from Bayonne, New Jersey, is it?

A. Not always, no, sir.

Q. In some cases it is made from other sources, is that correct?

A. On very rare occasions.

Q. Well from what other sources?

Mr. Stockton: Has this been marked in evidence yet?

Mr. Goodgold: Yes, this has been marked in evidence.

Q. From what other sources is shipment made?

Mr. Stockton: Well, I call attention to the fact that the [fol. 198] exceptional deliveries are shown on the statement which the Comp-roller has.

Mr. Goodgold: Yes, but I want to bring that out in the record more clearly so that the court can see it.

Mr. Stockton: I will be very glad to bring it out from this witness myself.

Mr. Goodgold: Have the witness tell me from the Taxpayer's Exhibit 27, the sources other than Bayonne from which shipment of fuel oil is made by the Standard Oil Company to the ships of the French Line.

By Mr. Goodgold:

Q. Will you please do that, and state from what source deliveries are made?

A. The date and——

Q. Just tell me from what source, the date, the quantity and to what ship of the French Line the shipments are made?

Mr. Stockton: Do you want him to read the whole statement over?

Mr. Goodgold: I want him to point out to me any shipments other than from Bayonne.

Mr. Stockton: Perhaps I can clarify this.

Mr. Goodgold: He hasn't answered my question yet; you can interrupt after he has answered my question, if you please.

A. All right, sir; we have July 30, the Normandie, delivery out of Mexican Petroleum Corporation.

[fol. 199] Q. And that is where?

A. Carteret, New Jersey. And we have the next one on August 31, to the Champlain out of Shell, at Bayonne, New Jersey; we have another one here on September 25, the

Champlain,—I beg your pardon, 24th and 25th—are out of Gulf.

Q. Where is that?

A. That is in Gulfport, Staten Island.

Q. Staten Island, New York City?

A. Yes, sir. That completes the picture.

Q. Let me have that please (taking statement).

By Mr. Stockton:

Q. How many deliveries are there all told?

Mr. Goodgold: Just a moment.

Q. Shown on that sheet?

A. There are 105.

By Mr. Goodgold:

Q. I call your attention again to Taxpayer's Exhibit 27, and I ask you whether the Standard Oil did not deliver to the steamer Champlain bunker fuel oil in the amount of $3,145.71 on September 25?

Mr. Stockton: Barrels?

Witness: Barrels.

Q. Is that barrels, I beg your pardon, barrels is that correct?

A. Yes, sir.

Q. And also on the 24th of September delivered from the same source Gulfport, Staten Island, 13,122.79 barrels.

Mr. Stockton: The witness has already testified that that is the fact.

[fol. 200] Mr. Goodgold: That may be so, but I want to get that in the record stronger.

Q. I also call your attention to the fact that his statement shows that the oil in every case was not delivered from sources owned by the Standard Oil Company but came from sources other than that from the Standard Oil Company; for example, on July 30, there was delivered to the steamer Normandie, from Carteret, New Jersey, 14,443.70 barrels, is that correct?

A. Yes, sir.

Q. And also on the 30th of July there was delivered from the same source 16,874.15 barrels, is that correct?

A. That is correct.

Mr. Stockton: The witness has already testified to that, and I object to this as repetitious.

Q. I also call your attention to the fact that this statement shows deliveries from Shell Oil Company, Shell Petroleum Oil on August 31, to the steamer Champlain 6,708.34.

A. That is barrels.

Q. Barrels? 6,708.34 barrels?

Mr. Stockton: Objected to on the ground the witness already testified to that effect.

Mr. Goodgold: Objection overruled.

A. Yes.

Mr. Stockton: Exception.

By Mr. Stockton:

Q. Now you said that there were 105 deliveries here, Mr. Hammel?

A. Yes, sir.

[fol. 201] Q. And there are five of those which are from refineries other than the Standard Oil Company of New Jersey refinery, is that right?

A. That's true.

Q. And five were exceptional deliveries from other refineries, is that so?

A. Yes, sir.

Mr. Goodgold: Can you tell us why—has the witness pointed out that delivery was not made from Bayonne or from sources owned by the Standard Oil Company?

Mr. Stockton: I don't think the witness is competent.

By Mr. Goodgold:

Q. Is it part of your duty, Mr. Witness, to know why deliveries are occasionally and exceptionally made from other refineries than the Bayonne refinery of the Standard Oil Company of New Jersey?

A. No, no, sir.

Mr. Stockton: Then I press my objection.

By Mr. Burke:

Q. In those exceptional cases where deliveries were made from a refinery other than the Standard Oil of New Jersey,

did you, as part of your duties, notify the Mexican Petroleum or the Shell or the Gulf to deliver to the barge the required amount of fuel oil?

A. Arrangements were made with those sources.

Q. Did you make those arrangements yourself?

A. Well, now, I made two of them, I believe, and my predecessor made the others.

[fol. 202] Q. Did you notify the Line that you were sending them oil from some other companies outside of Standard Oil of New Jersey?

A. No, sir.

Mr. Goodgold: No further questions.

By Mr. Stockton:

Q. I show you a set of five papers and ask you whether those relate to one of the exceptional deliveries in question?

A. It does.

Q. To which one?

A. The steamer Champlain, on August 31, out of Shell, Bayonne, New Jersey.

Q. And are those paper from your files?

A. They are.

Q. And they constitute what papers?

A. Why they represent our office copies of the order, the order ticket, or form in which I took the original order by 'phone, the lighterage ship or lighterage order, and the fuel oil receipts, barge fuel oil receipts.

Q. Are those records kept in the regular course of business, in compliance with the regular routine of the Standard Oil Company, and do they come from your custody?

A. They are, yes.

Mr. Stockton: I offer those in evidence.

By Mr. Burke:

Q. Are there no records sent to your company by the Shell Petroleum in that particular case, which would indicate the amount of oil loaded on the barges by Shell?

A. Offhand, I couldn't say, sir.

Q. Aren't you curious to know what record comes—how are you able to determine the amount loaded?

A. The amount that was loaded?

[fol. 203] Q. Yes, on the barge?

A. Well, now, I really don't know what arrangement we had with Shell as far as quantity was concerned——

Q. You are able to get from Shell the Standard Bunker Fuel Oil necessary for the French Line's use?

A. We are able to get from Shell?

Q. Yes, sir, the Standard Bunker Fuel Oil necessary for the French Line's use?

A. We were.

Q. And you were also able to get it from the Gulf Company?

A. Also from the Gulf, yes.

Q. And from Mexican Petroleum?

A. Mexican Petroleum. —

Q. And so far as Standard, what do you mean by "Standard" in respect to the orders; does that have anything to do with specifications; just what does that mean?

A. Mr. Burke, I think Mr. Ficken would be in a better position to testify to that than myself.

Mr. Burke: Do you want to mark that in evidence?

Mr. Stockton: Yes, sir.

(Received and marked Taxpayer's Exhibits Nos. 28a to 28e inclusive.)

(Hearing adjourned to June 25, 1937 at 10 A. M.)

Hearings Continued June 25, 1937.

Mr. Goodgold: This is a continuation of a hearing held on June 21, 1937, and the witness Mr. Hammel is recalled.

Mr. Stockton: Before proceeding with the witness, Mr. [fol. 204] Goodgold, I offer this stipulation to be spread on the record which has been reached between yourself, Corporation Counsel, and me as representing the Taxpayer.

Mr. Goodgold: There is no objection. Will you read that into the record, please.

Mr. Stockton: (Reading) It is stipulated and agreed by and between the Corporation Counsel of the City of New York acting on behalf of the Comptroller of the City of New York, and Haight, Griffin, Deming & Gardner, acting on behalf of Compagnie Generale Transatlantique, the Taxpayer herein, that any penalties that may be assessed against said Taxpayer by the City of New York in

consequence of any tax liability arising out of the transactions under review in the present proceeding shall be assessed only in accordance with and at the rates specified in Section 15 of Local Law #20 of 1934, as amended.

And, it is further stipulated and agreed that the tax deficiency claimed in this proceeding against the Compagnie Generale Transatlantique as Taxpayer by the Comptroller of the City of New York shall for all purposes of this proceeding be treated and considered also as an assessment of deficiency under Local Law #25 of 1934 as amended by Local Law #13 of 1935 in so far as said items are properly subject to said law as amended, notice of assessment and hearing under said Local Law #25 of 1934 [fol. 205] as amended by Local Law #13 of 1935 being waived by the said Taxpayer.

And, it is further stipulated and agreed that any rights given to the City under said Local Law #25 of 1934 as amended shall not be deemed waived in any respects except as above stipulated.

Mr. Burke: That's accepted by the City.

ALBERT J. HAMMEL, recalled, testified as follows:

By Mr. Stockton:

Q. Now, Mr. Hammel, at the end of the last hearing you were asked by the Corporation Counsel whether you have always been able to get bunker fuel oil satisfactory to the French Line from the Gulf Company and you replied, "Also from the Gulf." Will you explain just what you mean by that answer?

A. Well, I mean that on deliveries which were made to the French Line, the oil was satisfactory.

Q. During the term of the taxable period, did you supply to the French Line under their contract any oil from the Gulf other than the delivery by barges 105 and 124 to the steamer Champlain September 25, 1935?

A. That was to the French Line, is that right?

Q. Yes.

A. No. It was the only delivery.

Q. Only delivery from the Gulf?

A. From the Gulf, that's right.

Q. When you said then that you were able——

Mr. Goodgold: May I correct that statement, Mr. Stock- [fol. 206] ton. Your Taxpayer's Exhibit #27 also shows

a delivery on September 24th of 13,122 barrels from Gulf.

Mr. Stockton: Yes, the error is in the date. One date was the 25th and the other was the 24th. Barges——

Witness: One barge was on the 24th and one on the 25th.

Mr. Goodgold: There were two deliveries, is that correct?

Witness: There were two barges—yes, that's correct.

Q. The barge 105 which I mentioned was delivered on the 25th, was it not?

A. Barge 105 on the 25th, right.

Q. And barge 124 on the 24th?

A. On the 24th.

Q. And those were the only deliveries from Gulf during the taxable period?

A. Yes, sir.

Q. To the French Line?

A. Yes, sir.

Q. Do you know how that came to be made?

Mr. Burke: I object to that. I don't think the witness is competent to testify as to how it came to be made.

Mr. Stockton: Well, it's a question of whether he knows.

Q. Do you know why that was made from Gulf rather than the Standard Oil Company of New Jersey?

A. I would rather not testify on that, sir, because I have my ideas but at the same time——

By Mr. Burke:

Q. You don't know definitely?

Witness: No.

[fol. 207] By Mr. Stockton:

Q. You don't know of your own recollection?

A. I wouldn't go on record as making a statement.

Q. And do you think any one would know that better than you?

A. Mr. Ficken would know.

Q. What you meant then in saying that you always got satisfactory oil from the Gulf was that you got it each time that you applied to them—I withdraw that question.

Q. By "Always from the Gulf", then, what transaction did you refer to?

A. I referred to the transaction which we just discussed. Deliveries of the 24th and 25th to the Champlain.

Q. Have you investigated as to the course of business in making deliveries from other than the Bayonne refinery on the French Line—under the French Line contracts in evidence here prior to 1935?

A. Yes, sir. I checked into that and found out. I went as far back as 1929.

Q. What do you find?

Mr. Burke: I don't think that's material.

Mr. Stockton: I think that is material. We have a contract part of which—the performance of part of which falls in the taxable period, but the making of the contract, the course of conduct under the contract are all relevant in this proceeding.

Mr. Goodgold: Was it not already introduced into the record by the previous witness?

Mr. Stockton: No, Mr. Goodgold, this hasn't been testified to at all.

Mr. Goodgold: Mr. Cauchois——.

[fol. 208] Mr. Stockton: No, Mr. Cauchois has no knowledge of where the order came from. He thought it came from Bayonne as contemplated under the contract. This has not been testified to.

Mr. Goodgold: Will you repeat the question again, please, so that I can hear it?

(The last question was then read by the reporter.)

Mr. Goodgold: I will let it go on the record.

Q. What do you find as to deliveries from the commencement of the taxable period, December 10, 1934, back to 1929?

A. Well, I found that deliveries during those previous years from outside companies——

Mr. Goodgold: May I interrupt at this point. If this witness is going to testify with respect to his investigation relating to a period prior to 1935, I think the best evidence would be the documents showing delivery. This witness has not stated the basis or the records or whatever foundation he has laid in order to give us the testimony he is about to give us.

Mr. Stockton: All right. I will ask him.

Q. What documents did you examine?

A. The record books. In other words, the books in which all deliveries, the records, are kept.

Q. That is, the records which were made in the regular course of business?

A. That's right. And entered in these record books.

[fol. 209] By Mr. Burke:

Q. Where are those books?

A. Those books are in our office.

Q. Are they under your supervision?

A. Yes, sir.

Q. When did you make the examination?

A. When?

Q. Yes.

A. This morning.

By Mr. Goodgold:

Q. Just tell us what you did in making this examination? Just what did you do and what did you find?

A. I took the book out for each year and naturally went through it to find if there were any deliveries by outside companies. In that way, I was able to tell whether or not there were as many deliveries during those years from outside companies as there were during this taxable period.

By Mr. Burke:

Q. How do your books set up deliveries from outside companies? How would you know? What's on it?

A. Well, if a delivery was made, say by Shell, alongside that particular delivery would be written the name "Shell" or "Gulf" or any other outside company.

By Mr. Goodgold:

Q. That was not the original book of entry you looked at, was it?

A. Our original book of entry, yes, sir. The thing is this. This is not an accounting procedure. You understand that, of course.

Q. In making an entry into that book, you transcribed it from some other source?

A. From the order, yes, sir.

[fol. 210] Q. So it was not a book of original entry?
A. No, sir. Entry from the order.

By Mr. Stockton:

Q. Those books are your records kept in the regular course of business; which it is the regular course of business for your company to keep?
A. Yes, sir.
Q. To show those facts?
A. That's right.
Q. And when you said deliveries by other companies, do you mean a delivery made by another company on its contract or by the Standard Oil Company of New Jersey under its contract with the French Line about the oil coming from another refinery than its own?
A. Yes, sir. Delivery made under Standard Oil of New Jersey contract.
Q. With the French Line?
A. With the French Line, yes, sir.
Q. But the oil being delivered from another refinery as in these instances from the Gulf and the Shell and Mexican Petroleum?
A. Yes, sir.
Q. All right. What did you find?
A. I found the number of deliveries by outside companies was proportionately less during that period prior to the taxable period December 10, 1934 to December 31, 1935.
Q. In other words, that was proportionately less than five deliveries out of 105 for the taxable period?
A. Yes, sir.

By Mr. Burke:

Q. How many deliveries were made during the period of time for which you examined the books this morning?
A. I didn't count them, sir.
[fol. 211] Q. How many deliveries were made from outside companies in that period?
A. During that period?
Q. Yes.
A. I recall of only two barge deliveries by an outside company and that was—shall I mention that company?

Mr. Stockton: Yes, go ahead.
Witness: Barber Asphalt Company, Maurer, New Jersey.

By Mr. Goodgold:

Q. I take it you made a very thorough investigation, didn't you?

A. As thorough as I possibly could during the limited time that was allotted to me.

Q. Will you tell us how many barrels were delivered during that period by the Standard Oil Company?

A. I'm afraid my check wasn't as thorough as all that, sir.

Q. You cannot tell us the number of barrels?

A. No.

Q. Can you tell us the number of barrels that were delivered by other companies under the Standard Oil contract?

A. No, sir.

Q. Have you made any record of your examination in writing; any memorandum?

A. No. However, I can produce those records.

Mr. Stockton: We will ask Mr. Ficken to bring that testimony with him when he returns.

By Mr. Stockton:

Q. Mr. Hammel, in order to straighten out what appears to be a slight confusion on the record, I call your attention to Taxpayer's Exhibit 21 which shows the barge loading [fol. 212] of barge #122 on December 14th for the Paris as loading 11,328.43 barrels—that's #21, the fifth line down. Now, barge 122 then as indicated by that exhibit was empty when that number of barrels was put into it?

A. Yes, sir. That is right.

Q. And she then went to the Paris?

A. She went to the Paris. That's right.

Q. And there loaded on the Paris a certain number of barrels of that oil?

A. Right.

Q. And came back not completely empty, is that right?

A. Yes, sir.

Q. In other words, part of the oil was shut out by the Paris?

A. Yes, sir.

Q. And left on the barge?

A. That's true.

Q. And that is indicated in the ninth line of that exhibit where a barge 122 is shown on the third column with the name Paris and the figures 1235.92?

A. Yes, sir.

Q. That indicates the approximate number of barrels shut out, doesn't it?

A. That's right.

Q. In other words, both that barge and barge 11, as indicated by Taxpayer's Exhibit 22, were empty when they were loaded with oil for delivery to the Paris?

A. According to the reports, they were.

Q. And the shut out oil shown on Exhibit 21 as 1,235.92 barrels was left on that barge. What would be done with that in normal course?

A. That was pumped out in our tanks at Bayonne refinery.

Q. So it was not left there when the barge was loaded again for the next delivery to some other ship?

A. No. It was not loaded on top.

By Mr. Goodgold:

Q. Do I understand you to say that where there is a shut out such as you have described that the barge then pro- [fol. 213] ceeds back to the point of origin and has the oil pumped out of it?

A. Yes, sir.

Q. Rather than taking on additional oil that is required for future needs?

A. Well, that all depends, sir. It's all according to how many orders we have on hand. If we have no immediate use for that barge, rather than have the oil lie around, the oil is pumped back into the tanks.

Q. Where you have a pending order for refueling of a ship, then I take it, in that case you add the additional requirements to what is already in the barge and refuel the ship?

A. Refuel another ship, yes, sir. That's right.

Q. So you don't pump out the barge in every case?

A. Not in every case, no.

Q. Did it ever occur that the shut out quantity of oil in a barge was used to load another ship of the French Line without going back to its point of origin either for additional load or for pumping out? In other words, assuming that

you had, say, 1,235 barrels left in a barge after you filled the ship, would you then use that oil—that quantity of oil to reload another ship or refuel another ship without going back to the point of origin?

A. Yes, sir, that's happened. Yes, sir. However, the barge——

Q. How often does that happen?

A. We'll say in the case of the French Line you are speaking of that; is that right, sir?

Q. Yes.

A. It happened once and in that particular case—may I explain?—the barge proceeded over to New Jersey, Weehawken, New Jersey and then came back the following morning to fuel the French Line vessel.

[fol. 214] Q. And does it ever happen that there is a shut out quantity of oil on barges as a result of the loading of ships of other lines that you use in refueling some of the French Line ships? Get my point?

A. Yes, sir. Well, that's just what I was explaining, sir. That was a circumstance I was just relating.

Q. My question is this. You have shut out quantities when you load ships of the French Line and you also have shut out quantities when you load ships of other lines?

A. Yes, sir.

Q. We have already covered the question of shut out when it relates to the French Line. Now we go that part of the shut out that is the result of refueling of other lines by the Standard Oil.

A. Yes, sir.

Q. Is that quantity which is the shut out used at times in refueling the ships of the French Line?

A. That one particular incident which I just related was that.

A. Where I said that we had fueled another vessel other than the French Line vessel. We had a shut out and went over—the barge proceeded over to New Jersey, stayed there overnight, and the next morning came back to the French Line vessel.

Q. I don't mean that. That wasn't my question. I asked without going back to the point of origin. You had a shut out, say of 1,235 barrels in this case as a result of loading one of the French steamers?

A. Yes, sir.

Q. My question with respect to that was: Did that barge then go back to the point of origin to be refilled or to have the oil pumped out, or did it remain in the pier or harbor to refill or refuel another ship?

[fol. 215] A. That particular barge went back to the Bayonne refinery. The barge that you just referred to.

Q. To be refilled or reloaded, or to be pumped out?

A. To be refilled, yes, sir. Well, in that particular case, to be pumped out.

Q. My next question was: Did it ever happen that the amount that was a shut out in the harbor, did the barge at that time—I mean, was the fuel that was shut out used to reload another ship without going back to the point of origin? I don't mean that particular shut out. Any shut out.

A. Any shut out at all?

Q. Yes. To load another ship.

A. It's been done, yes, sir.

Q. How often?

A. I couldn't tell you the number of times.

Q. Has it been done very often?

A. No, only in an emergency, sir. It isn't common practice. In this particular case it was an emergency.

Q. How often do those emergencies happen?

A. How often? Well, I would say out of a year, this is not a definite figure, of course—I would say ten deliveries the most out of a year—a year's period.

Q. And the oil which was used to reload a French ship which was the result of a shut out of a reloading of another line, was the oil which was satisfactory to the French Line—the standard fuel oil, was it not?

A. Yes, sir. Standard fuel oil.

Q. And it could be used either by the ships of another company or by the ships of the French Line?

A. That's right.

By Mr. Burke:

Q. What does "standard fuel oil" mean? What does the word "standard" mean in connection with fuel oil?

[fol. 216] Mr. Stockton: I would remind the Corporation Counsel that the witness has previously been asked that question and has said that he was not capable of answering it but would refer it to Mr. Ficken.

Q. Let me ask Mr. Hammel this. Does your company sell the same type of fuel oil to other steamship lines that you sell to the French Line?

A. Yes.

Q. Drawn from the same tanks in Bayonne, or wherever your refineries may be?

A. From the same tanks, yes, sir.

By Mr. Goodgold:

Q. Same kind of oil?

A. Same fuel.

By Mr. Burke:

Q. Now, do you deliver to other steamship companies from the Gulf or Mexican Petroleum or from the other oil companies named?

A. What's that?

Q. Do you make deliveries to these other steamship companies of fuel oil which you obtain from Gulf or Mexican Petroleum or the other one that was named?

A. Shell.

Q. Shell, yes.

A. Well, we make deliveries to other companies from them, yes, sir.

Q. You buy oil from Gulf and make deliveries to them from it?

A. Yes, sir.

Q. And the same as to Mexican Petroleum and Shell?

A. Well, you made a statement I "buy"——

Q. Well, you obtain the oil from the tanks of other companies?

A. Right.

Q. And make deliveries of that oil to ships in the Harbor of New York?

A. That's right.

[fol. 217] Q. Not only to the French Line but other lines besides?

A. Yes, sir.

By Mr. Stockton:

Q. Is that a rare or a frequent occurrence?

A. It's a rare occurrence compared to the number of deliveries which we handle during the year.

By Mr. Burke:

Q. Let me ask you this, Mr. Hammel. In the event of a shut out on the barge, is that barge sealed with the balance of oil in its tanks?

A. In the event of a shut out?

Q. Yes.

A. Yes, sir. As I understand, it is.

Q. The customs officer seals that tank?

A. Seals that tank and it is taken back to the refinery.

Q. And who breaks the seal at the refinery?

A. The customs inspector there.

Q. And in the event that barge should be held overnight at some port till the morning awaiting some other ship, is that seal then broken by another customs officer?

A. Yes, sir. You mean at the other ship?

Q. Yes.

A. Yes, sir. We always have a customs officer.

By Mr. Stockton:

Q. Well, that is in connection with bonded oil, wasn't it?

A. That's right.

Q. And were all of the deliveries that you listed here either bonded or drawback oil?

A. Bonded or drawback, yes, sir.

Q. That is, as listed in Exhibit 27?

A. Yes, sir.

[fol. 218] Q. When you said, Mr. Hammel, that there were about ten deliveries, were you referring to the French Line contract at the taxable period or what?

Mr. Goodgold: Will you please repeat that question? I didn't hear it.

Q. When you said there were about ten deliveries where there was a shut out and a delivery of the oil had been shut out from one line to another line, were you referring to the French Line contract deliveries?

A. Referring to all deliveries. Deliveries to all of our trade.

Q. And not to the French Line contract alone?

A. No, sir.

Q. And not to the taxable period, or for what time?

A. During the taxable period.

By Mr. Burke:

Q. Referring to Taxpayer's Exhibit 27 in evidence, were the deliveries made to the Normandie from the Mexican Petroleum to the Champlain from the Shell, to the Champlain from the Gulf, deliveries of bonded fuel oil?

A. They were, yes, sir.

By Mr. Stockton:

Q. Reverting to the shut out from the Paris, I call your attention to Exhibit 24-B which shows that shut out, does it not?

A. Yes, sir. That's right.

Q. And shows a total net barrels 1,314.36?

A. That's right.

Q. Is that the same shut out as the one indicated on Exhibit 21 as 1,235.92 barrels?

A. It is, yes, sir.

[fol. 219] And the discrepancy is due to what, would you suggest?

A. Well, I would say the barge did not pump out the entire shut out. In other words, the refinery received only that amount from the barge, the 1,235.92 barrels, whereas the barge calibrations indicate that 1,314.36 barrels were shut out by the ship. Another reason, perhaps, for this difference might be accounted for by a difference of temperatures.

Q. Calling your attention to Taxpayer's Exhibit #29-A, I understood you to say on the last hearing that you did not get a barge loading sheet from the Shell as you do from the Standard works of Bayonne.

A. No. That's purely an accounting procedure. It's a matter which is handled by the accounting department so Shell and our company could——

Q. So that instead of a barge loading sheet from the works, you got some word from the accounting department.

A. That's about the way they handled it. I am not entirely familiar with the way the accounting department handles that. My desk is interested in the barge out-turn figures which, of course, we bill the French Line.

Q. This Exhibit 28-A was made out in regular course as you described in connection with the deliveries from Bayonne works to the French Line ships, was it not? That's made out in your office?

A. That was made out in our office, yes, sir.

Q. And it's originally made out for the Works "Bayonne"?

A. Yes, sir.

Q. And whose writing is that where "Bayonne" is crossed out and the word "Shell" written in?

A. That's my writing.

[fol. 220] Q. Did you make that as a result of instructions or information given you?

A. That's right. Instructions given me by my superiors.

Q. That is, between the time you made out the original paper and the time the delivery was started?

A. Yes, sir.

Q. And does the same thing apply to Exhibit 28-B where the word "Bayo" is struck out and the word "Shell" is written in?

A. Yes, sir.

Q. In other words, would you say there was a change there from the original intention?

A. There was.

Mr. Goodgold: I strike that out.

Mr. Stockton: All right. I withdraw it.

By Mr. Burke:

Q. Mr. Hammel, do you notify the French Line in each instance of where the delivery is being made of the oil?

A. I do not.

Q. Does your company notify them?

A. No, sir.

Q. Does the French Line know in each instance where delivery is coming from?

A. I don't see how they would, sir, because the transaction is handled by Mr. Touye of the French Line and myself and whatever information there would be pertaining to that delivery would only come from myself to Touye.

Q. And you do not tell Mr. Touye where the oil is coming from in each delivery?

A. No, sir. I only tell when—about what time the barge will be there.

Q. In the cases where the oil was delivered to the French Line from Gulf or Mexican Petroleum or Shell, does the [fol. 221] French Line know that the oil came from the Shell or the Mexican Petroleum or the Gulf refineries?

A. I don't see how they would, sir, because there is one—I take that back. They wouldn't know.

Q. They wouldn't know?
A. No, sir.

By Mr. Stockton:

Q. Referring to the delivery of July 30th to the Normandie, barge 57, which was loaded at Mexican Petroleum Company refinery, I show you these papers and ask you if those cover the delivery in your records?
A. They do.

By Mr. Burke:

Q. Any particular delivery?

Mr. Stockton: Yes.

By Mr. Stockton:

Q. What delivery does that cover?
A. That covers delivery to the Normandie on July 30, barges 57 and 58 out of Mexican Petroleum terminal at Carteret in New Jersey.

By Mr. Burke:

Q. That's the delivery referred to in Taxpayer's Exhibit 27 in Evidence on July 30th?
A. Yes, sir.

Mr. Stockton: I ask that those be marked in evidence in the same way as the previous documents showing delivery and be marked "A", "B", "C", and so forth.

(Discussion off the record.)

(Received and marked Taxpayer's Exhibits #29-A to 29-G, inclusive, in Evidence.)

[fol. 222] By Mr. Stockton:

Q. This Exhibit 29-A to G in Evidence shows the delivery in the same way as Exhibit 17?
A. Yes, sir.
Q. This shows the delivery from the Mexican Petroleum?
A. Mexican Petroleum, that's right.
Q. And is that also your striking out and your writing in of the words "Mex Pet" on the 29-A and B?
A. I made that change.
Q. You made the changes referred to, and when?

A. You mean the dates, sir?

Q. Yes. I mean when in the operation of making that delivery did you make that change? As near as you can state.

A. That change was made sometime after the order was put through. I think it was at a time I checked on that and found the order did not show the true source of the delivery. I naturally had to change it for our records.

By Mr. Burke:

Q. When was this delivery made? July 29, 1935, is that the date?

A. That's right.

Q. What was your job on July 29, 1935? Were you the shipping clerk as you testified last time?

A. No. I was in the statistical department.

Q. And was it part of your duty to correct these vouchers and orders and so on?

A. At that time? If I happened to detect an error, yes, sir.

Q. Would they ordinarily pass through your hands at that time?

A. They would.

Q. In every instance?

A. Yes, sir.

By Mr. Goodgold:

Q. What source did you use for the making of the change on the bills?

A. What source did I use?

[fol. 223] By Mr. Burke:

Q. How did you know a change should be made?

A. Well, for one, let's see.

By Mr. Stockton:

Q. Point out the changes not on the bill but on the order.

A. On the order. (Looking at papers.) That would be indicated by your loading report. If the delivery was not made out of your Bayonne refinery, of course, the Bayonne loading report naturally would not show same. Therefore, upon questioning further, I found that delivery should have

been listed out of Mexican Petroleum instead of Bayonne, a case of oversight in inserting this information on the order.

By Mr. Goodgold:

Q. Did the French Line ever see that change on your order which you have as Taxpayer's Exhibit #29?

A. Did the French Line see that?

Q. See the change on the order. Prior to the receipt of the order on board ship.

A. Well, naturally, the French Line wouldn't come into the picture in that at all, sir.

Mr. Goodgold: All right.

By Mr. Stockton:

Q. All right. And I show you this file of papers and ask you what that is?

A. That is a delivery made on September 24th—that was on September 24th by barge 124, and on September 25th by barge 105 to the steamship Champlain out of Gulf Oil.

Q. And those papers are similar to the ones previously [fol. 224] in evidence showing deliveries that come from your records?

A. They are, yes, sir.

Mr. Stockton: I offer that in evidence.

Mr. Goodgold: No objection.

By Mr. Burke:

Q. Same testimony you have given with respect to the other papers you reiterate in the case of these?

A. In that particular case, I was on the job at the time, sir.

Q. You, yourself?

A. I was the shipping clerk then. In September.

By Mr. Goodgold:

Q. Did you prepare Taxpayer's Exhibit 27?

A. I did.

Q. From what sources did you prepare it?

A. I prepared it from our orders, layouts, loading reports and office records.

Q. Are you sure that the points of delivery as shown on Taxpayer's Exhibit 27, or the source of the delivery—the source of the oil—is correct in every instance as indicated on Taxpayer's Exhibit 27?

A. I am, yes, sir.

Q. There is no mistaking about that at all?

A. No, sir. It was thoroughly checked.

Q. So that everything that appears in Taxpayer's Exhibit 27 showing the source of the oil is true and correct without any doubt at all?

A. It is, yes, sir.

(Received and marked Taxpayer's Exhibits #30-A to #30-F, inclusive, in Evidence.)

By Mr. Burke:

Q. Mr. Hammel, was any of the oil that was delivered [fol. 225] to the French Line from Mexican Petroleum or Shell or Gulf ever rejected by the French Line as not being suitable for their use?

A. Never, as far as I know, no, sir.

By Mr. Stockton:

Q. When you said you were on the job with regard to Exhibit 30, you mean that at that time you were the delivery clerk?

A. Yes, sir.

Q. So that the striking out of "Bayonne" and the writing in of "Gulf" was made by you on that?

A. On that, yes, sir.

Q. 30-A and B, when was that made?

A. That was made on September 23rd, the day on which I received the order.

Mr. Goodgold: Mr. Stockton, may I ask this question. In view of the fact that I have to hand down a ruling based on the evidence in the record, what is the materiality of this testimony with respect to the change that was made on these things? I would like to be enlightened a little. Would you please enlighten me as to just what you have in mind with respect to that?

Mr. Stockton: You mean the change of delivery?

Mr. Goodgold: What you intend to show by that.

Mr. Stockton: It is simply one item of evidence showing

that the normal and regular course of delivery was from Bayonne and that for reasons which will be developed from Mr. Ficken in special emergencies or exceptional situations oil was supplied from other refineries.

[fol. 226] Mr. Goodgold: Wasn't that already brought out in the record very clearly by several witnesses?

Mr. Stockton: No, that hasn't.

Mr. Goodgold: I think Mr. Cauchois testified pretty exhaustively and Mr. Hammel and Capt. Castelnau here has testified.

Mr. Stockton: No. Mr. Cauchois and Capt. Castelnau both said they don't know the workings of the Standard Oil Company and they assumed they were getting Standard bunker fuel oil from Bayonne all the time. I want to show exactly what happened and why.

Mr. Goodgold: That being the case—Mr. Hammel, no matter from what source the oil came originally, it was indicated on the order as Bayonne?

Witness: Yes, sir.

By Mr. Goodgold:

Q. And then if it developed later on that delivery was made from another source and you discovered that, you made the change as indicated on Taxpayer's Exhibits #28 and 29, is that correct?

A. Yes, sir.

Mr. Stockton: I object to that question unless it is confined to the delivery in question. There is certainly nothing to——

Mr. Goodgold: I am talking about the general course of procedure such as you have described a minute ago. That the general course as the witness stated was to have delivery from Bayonne and it was so indicated on the order no matter [fol. 227] from what source it came and then when it was discovered later on—when the true source of delivery was discovered—it was then indicated on the order by making a change in the manner indicated.

Mr. Stockton: I object to that statement as an inaccurate one. The witness not having stated——

Mr. Goodgold: Will you please state what the accurate statement is?

Mr. Stockton: You mean for me or the witness?

Mr. Goodgold: Well, if you say I stated inaccurately, will you state it accurately for the record. I want the record to be a true record. I want it to be a record of the testimony given by witness and not a record of my testimony. I am only asking these questions to be enlightened so that I may properly rule on the testimony.

By Mr. Stockton:

Q. Is your testimony that the deliveries were normally made from Bayonne?

A. Yes, deliveries were normally made from Bayonne, that's right.

Q. And in this period you had these five exceptions?

A. Exactly.

Q. As to one of those five exceptions——

Mr. Goodgold: Just a minute, Mr. Stockton. Let's get the testimony correct. You stated before that the statement I made was incorrect. Now I want to get that statement corrected. I stated the following: Normally, you testified, that delivery was made from Bayonne and that [fol. 228] you indicated on your order and then if delivery was made from some other source and you discovered it later, you made a change on the order to indicate from what source it did come in a manner which you have testified before, is that correct?

Witness: Exactly.

Mr. Stockton: That's incorrect for this reason.

Mr. Goodgold: Well, the witness just stated "Exactly".

Witness: Well, so far as my work is concerned, that's the way it was handled. Perhaps Mr. Stockton is trying to bring out another point here.

Mr. Goodgold: Well, never mind what Mr. Stockton is trying to bring out. You confine yourself to your testimony. I am asking you a question, whether those are not the facts as you have given them to me?

Witness: I think they are, yes, sir.

By Mr. Stockton:

Q. And who did you hear from as to the change of delivery from Bayonne to some other refinery?

Mr. Burke: The witness testified that he noted the change in the loading slip. From that he made his change in the order. It wouldn't be a question of notification from somebody else.

Mr. Stockton: I am asking him where he got it from.

Witness: In the case when I was on the shipping job, I [fol. 229] would naturally be advised by some superior to make arrangements to take that oil out of whatever outside company we were supposed to take it out of.

Q. And on the receipt of those instructions, you then noted accordingly, as you testified?

A. I changed my order, yes, sir.

By Mr. Burke:

Q. That only applies to Taxpayer's Exhibit 29, is that so? In the other cases, you picked up the difference from the loading slips, isn't that so?

A. That's right.

Q. That was before you were on the job?

A. Yes, sir.

Mr. Burke: All right.

Mr. Goodgold: If in the course of examination of these minutes, Mr. Stockton, there appears any incorrect statement I may have made, I want to put on record as having that statement corrected as by the evidence which was introduced.

Mr. Stockton: Yes, I think we will have no difficulty in that, Mr. Goodgold.

Mr. Goodgold: It is my endeavor merely to get the facts clearly stated in the record after they have been given to us by the witness and if I have—any way colored them or changed them, I want to be corrected by the actual facts as they have been given to us at these hearings.

Mr. Stockton: Well, I think that the record will check both of our statements when it is finally made up.

[fol. 230] Mr. Goodgold: I want the Taxpayer to feel at all times that the Presiding Officer's function here is merely to get the facts and get all the facts so that he may rule properly.

Mr. Stockton: I'll excuse Mr. Hammel and call Mr. Jones.

GEORGE W. JONES, JR., residing at 4136—51st Street, Woodside, Long Island, called as a witness in behalf of the Taxpayer, being duly sworn, testified as follows:

Mr. Goodgold: You may proceed.

Mr. Stockton: I see the two witnesses have come in that I wanted to release as quickly as possible; and therefore, if agreeable, I will withdraw Mr. Jones and take their testimony which will be short. I call Mr. Touye.

THEODORE M. TOUYÉ, residing at 140 Fox Street, Oakwood Heights, Staten Island, New York, called as a witness in behalf of the Taxpayer, being duly sworn, testifies as follows:

By Mr. Stockton:

Q. Mr. Touyé, what is your occupation?

A. I am in charge of the fuel oil deliveries on the pier.

Q. And you are employed by what company?

A. By the French Line, Pier 88, North River.

[fol. 231] Q. How long have you been in their employ?

A. Twenty-two years.

Q. And how long have you had charge of the actual deliveries of fuel oil to your French Line ships?

A. For the past ten years.

Q. At New York?

A. At New York.

Q. Will you state briefly the scope of your duties in that connection?

A. Yes. When we get a wireless from the ship, we order the fuel and we call up the suppliers and after, we check on the arrival of the barges and furnish the chief engineer with the analysis.

Q. When you say "the suppliers", what suppliers have you been dealing with?

A. Standard Oil of New Jersey.

Q. Since you were in charge of the fuel oil work there?

A. Yes. It has always been the same.

Q. And whom do you telephone?

A. Telephone to the Marine Sales Division of the Standard Oil Company of New Jersey.

Q. And whom do you talk to there?

A. Mr. Hammel.

By Mr. Goodgold:

Q. Is Mr. Hammel the same gentleman who just testified?
A. I don't know who he is.

Mr. Stockton: That's Mr. Hammel sitting there. (Indicating.) He is the same gentleman who just testified.
Witness: I seen him perhaps once. I don't remember.

Q. He is the gentleman?
A. He is the gentleman. I call him.
Q. And you have seen him once?
A. Yes.

[fol. 232] By Mr. Stockton:

Q. How does the oil come to the ships?
A. It is shipped in barges from New Jersey to our pier.
Q. Has that been the course throughout the term of your dealings?
A. Always has.
Q. Have you visited the Bayonne works itself?
A. Yes. I went down there once to Bayonne, New Jersey.
Q. The works of Standard Oil Company of New Jersey there?
A. Yes, sir.
Q. Do you know how far away they are from the ships?
A. Well, I guess approximately ten miles away.
Q. That is, when your ships are at Pier 57 or at Pier 88, it is about ten miles away?
A. About ten miles away, yes, sir.
Q. I show you a paper and ask you what that is?
A. That's a fuel oil analysis. That's an analysis of the fuel put on board our vessels.
Q. And do you receive that in the regular course of business?
A. Yes, we do. For every delivery of fuel, we receive one of these sheets prior to the sailing of the vessel.
Q. And is that paper kept in your files?
A. Yes. We keep one copy in our files.

Mr. Stockton: I offer that in evidence.

By Mr. Burke:

Q. How does this come to you, Mr. Touyé?
A. That's mailed by the Standard Oil Company of New Jersey, 26 Broadway, to us.

Mr. Goodgold: Of course, the proper procedure would be to mark that for identification and then mark it in evi- [fol. 233] dence, but we will permit the procedure here and mark it in evidence.

(Received and marked Taxpayer's Exhibit #31 in Evidence.)

By Mr. Stockton:

Q. When do you receive that with respect to the time of delivery of the fuel oil to your steamers?

A. We always receive those statements before the sailing of the vessel and one copy goes to the chief engineer.

Q. And do you also receive in regular course the invoices for the oil?

A. I do.

Q. Are these the invoices that I show you for the oil delivered to the Champlain September 24th and 25th, 1935?

A. Yes, sir.

Mr. Stockton: I offer those in evidence.

Mr. Burke: The testimony thus far being given by this witness and the papers you have already introduced and ask to introduce in evidence refer only to one shipment of oil, is that correct?

Mr. Stockton: Yes. They all refer to the shipment of the Champlain September 24th and 25th.

Mr. Burke: And had nothing to do with any other shipments at any other time?

Witness: These papers?

Mr. Burke: Yes.

Mr. Stockton: Only to that.

Mr. Burke: Only to the one, all right.

Mr. Goodgold: No objection.

(Received and marked Taxpayer's Exhibits #32-A and 32-B in Evidence.)

Q. Did you receive any other papers in connection with that delivery to the Champlain on September 24 and 25, [fol. 234] 1935, other than Exhibits 31, and 32-A and B?

A. No, sir.

By Mr. Goodgold:

Q. Did you receive any other papers at any other time with respect to that shipment?

A. No, sir.

By Mr. Stockton:

Q. Well, did you receive any information from the Standard Oil Company by telephone or orally or otherwise as to where that oil came from.

A. No, I did not.

By Mr. Goodgold:

Q. You are sure of that, are you not?

A. Absolutely.

By Mr. Stockton:

Q. It has been testified here that those two deliveries of barges 105 and 124 on the 25th and 24th of September brought oil which had been loaded into the barges at Gulfport at the installation of the Gulf Refining Company. Was that brought to your attention at any time?

A. It was not.

Q. If it had been, what would you have done?

A. I would have advised——

Mr. Goodgold: I object to that.

Witness: I would have advised my superior.

Mr. Goodgold: I strike that out. Purely speculation as to what he would have done.

By Mr. Stockton:

Q. I'll ask another question. What would it be your duty to do?

A. It would have been my duty in so far as all deliveries [fol. 235] of fuel oil coming from Bayonne and Bayway—and any oil coming from any other refinery certainly would have struck our attention immediately.

Q. And it would have been your duty to do what?

A. Notify my immediate superior of the fact.

Q. I show you these papers and ask you what they are?

A. Papers—they are fuel oil analyses and fuel oil bills from my files.

Q. And these relate to what delivery?

A. Delivery to the Champlain on August 31, 1935.

Q. By any particular barge?

A. Barge #58.

Mr. Stockton: I offer these two in evidence.

By Mr. Burke:

Q. Are those the only papers with respect to that transaction—that one delivery?

A. Yes, sir.

Q. Invoice and analysis?

A. Yes, sir.

Q. That is all you get?

A. That's all we get.

(Received and marked Taxpayer's Exhibits #33-A and 33-B in Evidence.)

By Mr. Stockton:

Q. With reference to Exhibits 33-A and B, is the same thing true that you testified before that you got no other kind of notice or advice of any sort as to where the barge came from?

A. No. We got no other papers at all.

Q. No; but did you get any oral advice or notice of any kind?

A. No oral advice either.

Q. And is your testimony the same as to this delivery as to your—as to what you would do as to your duty?

[fol. 236] Mr. Burke: I object to that as to what he would do. He already said what his duty is.

Mr. Stockton: All right. I withdraw that question.

Q. I show you three papers here and ask you what those are?

A. That's the Normandie delivery on July 30, 1935.

Q. Those papers are from your files?

A. Yes, sir.

Q. And consist of the two invoices and a test letter?

A. Yes, sir.

Q. This test letter is a copy, is it not?

A. It's a copy.

Q. The original having been sent to——

A. Havre, France.

Q. Havre?

A. Yes, sir.

Mr. Stockton: I offer those papers and understand that there is no objection made to the copy as such.

Mr. Burke: Of the analysis?

Mr. Stockton: Of the test letter or the analysis.
Mr. Goodgold: No objection.

(Received and marked Taxpayer's Exhibits #34-A, 34-B, 34-C, in Evidence.)

By Mr. Stockton:

Q. And with reference to Exhibits 34-A, B and C, what is your testimony as to whether you received any other papers or notice of any sort in regard to the place from which that oil was loaded in the barges?

A. Same as my previous testimony.

Mr. Stockton: That's all.

[fol. 237] By Mr. Burke:

Q. Mr. Touyé, how long have you been in charge of the fuel oil deliveries on the pier?

A. For the past ten years approximately.

Q. And what were your specific duties in that regard during the taxable period December 10, 1934, and December 31, 1935?

A. I had charge of ordering the oil, following up the deliveries and so forth, and passing invoices, and complete charge of all fuel operations.

Q. From December 10, 1934, to December 31, 1935, was it your duty to consult with Mr. Cauchois or Capt. Castelnau as to the orders you placed with the Standard Oil of New Jersey?

A. No, sir. The orders were automatically placed with the Standard Oil of New Jersey.

Q. And you did not have to consult with anyone so far as the actual placing of the order was concerned?

A. No, sir, it was understood that the contract was always with the same concern.

By Mr. Goodgold:

Q. You never had to consult with Mr. Cauchois?

A. No, sir.

Q. With respect to the deliveries?

A. Never did.

By Mr. Burke:

Q. Or with Capt. Castelnau to make the deliveries?

A. Never did.

Q. I refer you to the invoices marked in evidence Taxpayer's Exhibits 32-A and B, and I ask you whether or not those invoices differ in any respect from any other invoices you have received from the Standard Oil Company of New [fol. 238] Jersey in the taxable period except, of course, as to amounts and prices?

A. They are practically the same except that I notice here that they leave "Bayonne" out of this Champlain invoice, and they have this on the Normandie invoice. (Indicating.)

Q. Is that the first time you have noticed that discrepancy?

A. I have never paid any particular attention to those things.

Q. Do all the invoices that are rendered pass through your hands?

A. They do.

Q. And throughout the taxable period, were the invoices all in the same forms so far as you recall?

A. All more or less the same.

Q. And if I pointed out to you a discrepancy in the case of Taxpayer's Exhibit 34-A and Taxpayer's Exhibit 27 in Evidence which indicates that the shipment of the fuel oil under date of July 30, 1935, to the Normandie came from the Mexican Petroleum or from Carteret, New Jersey, would that be news to you at this time?

A. It would be because all the fuel oil deliveries received from the Standard Oil came from either the Bayway or Bayonne refineries.

Q. But you don't know of any instance, do you, of your own knowledge where the oil came from some other source?

A. No, sir, I do not.

Q. Were you ever informed by the Standard Oil Company of New Jersey that they were sending you fuel oil from Shell or from Gulf or from Mexican Petroleum?

A. No, sir. They have never informed me to that effect.

Q. And how do you know in each instance the oil came from Bayonne or Bayway? Have you any personal knowledge? Do you follow the barge or know where it is loaded? [fol. 239] A. Yes, sir. We have personal knowledge.

By Mr. Goodgold:

Q. No, what you have——

A. I have personal knowledge that they came from Bay-

onne and Bayway refineries of the Standard Oil of New Jersey.

By Mr. Burke:

Q. Now, in the case where the oil came from Carteret, New Jersey, or Gulfport, Staten Island, you didn't know that it didn't come from Bayonne, did you?

A. No, sir, I did not.

Q. Then you are not sure in every case where the oil comes from, are you?

A. Yes, sir. It was always as I understand that the fuel oil came from the New Jersey refineries.

Q. But you don't know where the fuel oil came from in each case?

A. No. After all it is only from what we are told. Because I am not there when the barges are loaded.

By Mr. Goodgold:

Q. You are sure now you don't know from what source the oil is delivered?

A. No, sir, I don't know, if that is the question.

Q. My question is: Do you or don't you know from what source oil is delivered?

A. It has always been our understanding that it came from the New Jersey——

Q. I didn t ask you that. I asked you: Do you know of your own knowledge from what source these various shipments of oil from the Standard Oil Company are made to your ships?

A. Well, I can say no, with an exception that we have [fol. 240] been informed—that I have been informed by the Standard Oil of New Jersey that the shipments sometimes come from Bayonne and other times from Bayway.

Q. Have you ever been informed that they come from Staten Island?

A. I have not.

Q. You are in charge of all fuel oil supplies?

A. Yes, sir.

Q. Would you be surprised to know that one of the witnesses for the Taxpayer has testified and there is in evidence now Taxpayer's Exhibit 27 showing that fuel oil supplied to your ships by the Standard Oil Company does at times come from sources in Staten Island?

A. If it did, I was never notified of the fact.

Q. Will you deny that as a fact?

A. I will not.

Q. If the records indicate that such fuel oil did at times come from Staten Island in the City of New York, or from Carteret, New Jersey, you would not dispute that, would you?

A. If it came from anything but——

Q. If the records show that?

A. If the records we have received show that?

Q. No, if the records introduced here as Taxpayer's Exhibit #27 show that, would you dispute that?

A. I would not.

Q. The oil that you buy from the Standard Oil Company of New Jersey is known as standard fuel oil, is that correct?

A. Standard bunker fuel oil.

Q. What kind of fuel oil is standard bunker fuel oil?

A. It's a bunker oil of bunker grade C fuel oil.

Q. And is that the kind of oil that can be used by ships plying the high seas?

A. Yes, sir.

[fol. 241] Q. And can it be obtained from sources other than the Standard Oil Company?

A. Yes, sir.

Q. The very same standard bunker fuel oil?

A. Yes, sir.

Q. So that the oil which is delivered—which has been delivered to the ships of the French Line from Carteret, from Staten Island, from Bayway, and from Bayonne are all of the same standard quality?

A. Yes, sir. Grade "C".

Q. And they can be used interchangeably?

A. Yes, sir.

Q. And it wouldn't make any difference to your company from what source the oil was delivered as long as you got the right price or the price in accordance with your contract?

A. In accordance with the specifications of the contract.

Q. In other words, if the Standard Oil Company sought to deliver all of the oil from Staten Island, gave you the standard bunker fuel oil grade "C"—charged you the same price, delivered it in the same manner, gave you the same satisfactory service, you wouldn't object to receiving that oil?

A. No, sir.

By Mr. Burke:

Q. When are these analyses furnished; just prior to the ships' sailings?

A. Prior to the ships' sailings.

Q. And the purpose of the analysis, as I gather from evidence heretofore given—if I am wrong correct me—is to enable the engineer aboard, the chief engineer, to adjust his oil burners?

A. That is correct, and to see that it comes within the specifications of the contract.

Q. And how are these analyses checked against the contract in each instance?

[fol. 242] A. Well, they are—there is a certain limit on that. Now, on flash point. For instance, if it was below 150, the fuel would be rejected as being dangerous.

Q. If it meets the specifications in the contract, that is satisfactory for your purpose, is it not?

A. Yes, sir.

Q. The only purpose of this analysis is to check with the specifications and to advise the engineer of any change in the viscosity or flash point or whatever is necessary in order to enable him to adjust his burners, is that right?

A. That's right.

By Mr. Stockton:

Q. Who is the superior you report to?

A. The superior is Capt. Le Friant.

Q. And is there any one between your position and Capt. Le Friant's?

A. Yes, sir. There is Capt. Castelnau.

Q. And who has particular duties with regard to fuel oil of the two? Capt. Le Friant or Capt. Castelnau?

A. Capt. Castelnau.

Q. Well, would any report of yours go directly to Capt. Le Friant or would they go first to Capt. Castelnau?

A. They go to both. Capt. Castelnau and Capt. Le Friant.

By Mr. Burke:

Q. Who is Capt. Le Friant?

A. He is Marine Superintendent.

Q. And Capt. Castelnau is his assistant?

A. Assistant Marine Superintendent.

Q. Do you have to consult any of those men when purchasing oil, prior to placing the order?

A. The order is placed automatically after the contract is signed.

[fol. 243] Q. Well, in order to enable any one of your boats to have sufficient oil for its next voyage, you are informed directly from the boat by wireless as to its needs?

A. Yes, sir.

Q. And then you call Mr. Hammel?

A. Call Mr. Hammel, place the orders, time the arrival of the barges for the convenience of the chief engineer.

By Mr. Goodgold:

Q. Did you ever have to consult with Mr. Cauchois with respect to that?

A. Never did, sir.

By Mr. Stockton:

Q. How long before the oil is actually delivered do you generally get your wireless to put in your order?

A. Approximately two days—forty-eight hours.

By Mr. Burke:

Q. Are the oil barges ever awaiting the arrival of the ship alongside your pier?

A. No. Sometimes they are ordered just—we'll say about ten to fifteen minutes after the vessel arrives at the pier, to allow the vessel to be docked and then the barges go alongside.

Q. Does it ever happen the barges are waiting there for the boat?

A. It happens once in a great while.

By Mr. Goodgold:

Q. It does happen, however?

A. It does happen.

Q. You couldn't tell from any of the invoices from what source the oil came other than if it were marked on the invoice?

A. That's right.

[fol. 244] Q. And if the marking on the invoice were incorrect, you would not know that?

A. Well, if the marking had been anything outside of the two ports previously mentioned, I would have known.

Q. Well, in the case just testified to, where it appeared on Taxpayer's Exhibit 34 where a marking appears "Bayonne" when, as a matter of fact, it was Carteret, New Jersey, you wouldn't know that, would you?

A. No. Because we are never notified.

Q. So that a marking on the bill wouldn't always indicate the true cource from which the oil was delivered?

A. Well, we have always been led to believe the markings on there were correct.

Q. I know. But in view of this Taxpayer's Exhibit 34, it is reasonable to believe now that not in every case is the marking on the bill as to the source of supply the true source of supply?

A. From what I have heard.

Q. Is that correct?

A. Yes, sir.

By Mr. Stockton:

Q. Do you go by the markings on the bill or markings on the test letter?

Mr. Goodgold: What do you mean "do you go by"?

Mr. Stockton: In judging where the delivery was made from.

A. Well, we generally look at the both of them. We generally look at the analysis sheet and generally on the invoice.

Q. Now, the analysis sheet you said always arrives before the ship sails.

A. Yes, sir.

[fol. 245] Q. Whereas the invoice arrives some days afterwards, is that right?

A. Yes, sir.

By Mr. Goodgold:

Q. In any event, assuming that the markings on the invoice as to the source of supplies are correct, you would only know about the source of supply after the oil has been loaded onto the ships and only at the time when you received the invoice?

A. We received the analysis. Because we get this before we receive the invoice.

Q. The analysis doesn't show the source of supply, does it?

A. Yes, sir, it does.

Q. Then you would know that at the time the oil is delivered to you?

A. Yes, sir.

Q. And not before it's delivered to you?

A. Not before, no, sir.

Q. And if you discovered from the markings on the invoice or analysis paper that it came from a source other than from Bayonne, for example, from Staten Island, that wouldn't make any difference to you providing you got the same standard bunker fuel oil?

A. Yes.

Q. Grade "C"?

A. The only thing is if I had noticed a thing like that I would have called it to the attention of my superiors.

Q. Would it make any difference to you?

A. Personally it would make no difference.

Q. Would it make any difference to the company so far as the use of the oil on the ship is concerned?

A. No, not so far as the use of the oil is concerned.

By Mr. Stockton:

Q. Do you know about viscosity of oil?

A. I know a little about it.

Q. Capt. Castelnau has testified he has made some investigations of the Shell specifications of bunker fuel oil [fol. 246] with regard to viscosity. Do you know about those investigations he made?

A. No, sir, I do not.

Q. He didn't discuss those with you?

A. He did not.

Q. Does the engineer make his own analysis of these oils?

A. The engineers have apparatus on board and they generally make their own analysis to check against these sheets that they receive from the Standard Oil Company of New Jersey.

Q. And their analyses—do they go to the Paris or New York office?

A. Which ones?

Q. The engineers' analyses.

A. The engineers', they go to the Havre agency.

Q. And where is the decision made as to whether the oil is acceptable or not as to the specifications?

Mr. Burke: Well, wait a minute. Does he know the decision is made by anybody? They accept the oil and use it.

Mr. Goodgold: He has testified already to that, Mr. Stockton. He said the oil was received and when the oil was loaded on the ship and if it measured up to the grade that was standard bunker fuel oil grade "C", that was satisfactory. He already testified to that.

Mr. Stockton: It has already been testified that Paris has the final word on whether the oil is satisfactory in the long run or not. That particular oil may have been used on that ship and an objection might be made to the supplier as to the grade of oil; it is up to Paris where the final decision is made.

[fol. 247] Mr. Goodgold: But in any event, the oil has been accepted and has been used or has been paid for whether or not the Paris office has accepted it or not.

Mr. Stockton: That's a little different question, Mr. Goodgold. We are talking now of the construction put by Paris on their contract and their practice under the contract.

Mr. Goodgold: How is he competent to testify to that? He is only in charge of fuel oil supplies with respect to their deliveries. He testified he gets an order by wireless from a ship, then he notifies Mr. Hammel of the Standard Oil and advises him when the ship will be here, and also orders—tells him when he wants the barges there so that the necessary fuel may be loaded onto the ship. Beyond that he has testified to nothing.

Mr. Stockton: He can only testify, of course, within the scope of his own duties and knowledge, and each of the witnesses can only do that, and the whole picture has to be put together from the testimony of all the witnesses. I simply wanted to test his knowledge to its full extent.

By Mr. Stockton:

Q. Do you know whether the Havre agency office does anything with regard to deciding on the acceptability of oil?

A. The final say is with our Paris office.

By Mr. Burke:

Q. Well, as a matter of fact, the contract was entered into here, it has been testified, and was approved by Paris

[fol. 248] as to the specifications of the oil. Now, do you know of any instance during the taxable period where Paris objected to the oil that was furnished to the ships?

A. No, sir, I do not.

Mr. Stockton: That's all. I call Mr. Jones.

GEORGE W. JONES, JR., recalled, testifies as follows:

By Mr. Stockton:

Q. What is your occupation?

A. I have charge of all customs duties for the Standard Oil of New Jersey.

Q. And you are in their employ with offices at 26 Broadway?

A. Yes, sir.

Q. How long have you been in their employ?

A. Twenty years.

Q. And during that time have been doing what?

A. Well, for about the last fifteen years I have been working on Custom House duties.

Q. Will you explain what bonded oil is in connection with steamship fueling?

A. Bonded oil is imported fuel oil brought in from a foreign country and placed in a bonded warehouse and no duty has been paid. You can either export that fuel oil to a foreign country without paying duty, or you can deliver it to certain type vessels without paying duty.

Q. Does the Standard Oil Company of New Jersey deal in bonded oil?

A. Yes, sir.

Q. And does that oil come from sources or wells owned by Standard Oil Company of New Jersey?

[fol. 249] A. Well, I am not in a position to state that. I believe it does. But I wouldn't want to go on record as saying so.

Q. What oil is being supplied currently to the transatlantic steamers fueling in New York?

Mr. Goodgold: How is that material on the question which relates to the period December 10, 1934, to December 31, 1935?

Mr. Stockton: I'll change that question to say:

Q. Is that true during the taxable period which is December 10, 1934, to December 31, 1935.

A. Well, it would either be drawback fuel oil or bonded fuel oil.

Q. Explain briefly what drawback oil is?

A. Drawback fuel oil is oil made from an imported crude on which a duty has been paid and upon exportation or delivery to certain type vessels, we obtain a drawback.

By Mr. Burke:

Q. You mean a refund of the duties paid?

A. Yes, sir.

By Mr. Stockton:

Q. Is the bonded oil that is handled by the Standard Oil Company kept in bonded warehouses?

A. Yes, sir.

Q. What are those bonded warehouses and where are they?

A. They are located at Bayonne, New Jersey. They are tanks, also pipe lines, pump houses.

Q. And are those controlled by any government supervision?

A. Yes, sir. They are all under government supervision.

[fol. 250] Q. The government has what there—inspectors or customs officers?

A. They have an inspector acting as a storekeeper.

Q. So that the oil in those tanks is strictly controlled?

A. Yes, sir.

Q. During the taxable period——

Mr. Goodgold: I object to the "strictly controlled".

Q. Well, will you explain just how it is controlled?

A. The line leading from the ship to the bonded tanks, which is a warehouse, have certain valves along the line to divert that oil to any number of tanks. Well, before a boat starts discharging or a boat loads or a barge loads with this bonded fuel oil, those outlets or valves are sealed. After the pumping has been completed, the tank or the warehouse is sealed by a government man.

Q. You are speaking now of oil coming in?

A. Or going out; the same practice is used.

By Mr. Burke:

Q. What class of warehouse is that over there?

A. Class 2.

Q. Any Class 6 over there?

A. We did, but I can't remember the period. It may have been——

Q. During the taxable period?

A. It may have been, but I don't know. I don't think it was but it may have been. But the same condition would apply on that as on a Class 2, except that in Class 6 we brought in the crude and ran it up into finished products of which one of them was the fuel oil.

[fol. 251] Q. Well, out of the Class 6 you can withdraw the oil without getting the authority of the customs officer, couldn't you?

A. No, sir.

Q. Not at all?

A. No, sir. As a matter of fact, under a Class 6, the oil must be exported. Under a Class 2, you have got the privilege of exporting it or paying duty on it.

By Mr. Stockton:

Q. Does the Standard Oil Company furnish a bond to the government?

A. Yes, sir.

Q. And is that in the regular prescribed form?

A. Yes, sir.

Q. Is that the form of bond? (Showing paper to witness.)

A. Yes, sir.

Q. Both front and back?

A. Yes, sir.

Q. And the blanks are filled out to accord with the particular lot of oil and the number of the warehouses and so forth?

A. That's right.

Mr. Stockton: I offer it in evidence.

Mr. Goodgold: I object to it on the ground that it is not the bond. It is merely a form of a bond. A blank form. It has no connection whatever with the bond that you allege has been put up by the Standard Oil Company with the government. I will accept as evidence the original bond

or a certified or a photostat copy thereof, but I will not accept in evidence a blank form of a bond.

(Discussion off the record.)

Mr. Goodgold: We will stipulate for the record that a bond has been posted with the government.

Mr. Stockton: And I further ask that you stipulate that [fol. 252] the bond may be supplied or a photostatic copy of the bond actually in force put in.

Mr. Goodgold: Yes.

Mr. Stockton: All right. That's satisfactory.

(Pursuant to the foregoing, a certified copy of the bond was subsequently received and marked Taxpayer's Exhibit No. 40, in Evidence.)

Mr. Goodgold: Well, will you proceed.

Q. When the oil is furnished from your warehouses for bunkering of transatlantic steamers in the Port of New York, does the government control that by a customs man?

A. Controls them by customs seals.

Q. And does any one accompany——

A. No, sir.

Q. (Continuing:) the barge?

A. No, sir.

Q. Does any one meet the barge at the steamer?

A. Yes, sir.

Q. Who does?

A. The customs inspector.

Q. In every case?

A. Yes, sir.

Q. And what does he do there?

A. Breaks the seal and supervises the loading.

Q. Is that the practice followed in regard to all bunker oil deliveries to steamships?

A. Yes, sir.

Q. And was during the taxable period?

A. Yes, sir.

Q. Is any certificate required or taken from the steamships as to the use they make of the oil in connection with these bonded requirements?

A. Only in the case of a ship clearing foreign via a domestic port, or a ship clearing for a foreign possession or a ship clearing for the west coast.

[fol. 253] Q. But in case of steamers clearing from New York and going to Europe, no certificate or proof is required of the use of the oil?

A. No, sir.

Q. You testified, I think, that all the tanks which are bonded warehouses of the Standard Oil Company of New Jersey are located at Bayonne?

A. Yes, sir.

Mr. Goodgold: Testified what? (To reporter.) Read that, please.

(The last question and answer were repeated by the reporter.)

By Mr. Burke:

Q. Are there any at Bayway?

A. Not for transatlantic steamers, no, sir.

By Mr. Stockton:

Q. As to drawback oil, where are your bonded warehouses located for that?

A. What was that, sir?

Q. As to drawback oil——

A. Either at Bayonne or Bayway.

Q. Have you any tanks in any other place besides those two places?

A. Not in the vicinity.

Q. You mean not in the vicinity of New York?

A. Yes, sir.

Q. None in the State of New York, are there?

A. No, sir.

By Mr. Goodgold:

Q. You are testifying now with respect to the bonded warehouses only; that you only had these bonded warehouses in Bayonne, is that right?

A. For transatlantic steamers.

Q. And when you say you haven't got them anywhere else, you refer to warehouses anywhere else?

[fol. 254] A. That's right. I am referring to New York. We have got them outside of New York, at Baltimore, and so forth, but I am only referring now to New York.

Q. But the testimony refers to warehouses, is that right?
A. That's right.
Q. Bonded warehouses?
A. Right.
Q. Of the Standard Oil Company?
A. Right, for transatlantic business.

By Mr. Burke:

Q. Now, the drawback oil comes in in the form of crude oil, is that right?
A. Yes, sir.
Q. And is refined?
A. Yes, sir.
Q. Where does the Standard Oil receive and refine the oil which is used for drawback oil?
A. At either Bayonne or Bayway.
Q. Where is that oil stored?
A. At either one of those places.

By Mr. Stockton:

Q. And it is furnished then from one of those places to the barges for loading on the transatlantic steamers loading at New York?
A. Yes, sir.
Q. And do you then receive notice that it is going to a transatlantic steamer and then make application for drawback duty?
A. No. In the case of a drawback delivery, we need an affidavit from an officer of the steamship company that it was consumed on board the steamer and that none of it was landed in the United States or any of its possessions and also a receipt. Both of those show the amount delivered.
Q. You obtain those regularly from steamships?
A. Yes, sir.

[fol. 255] By Mr. Burke:

Q. Does the government exercise any supervision over the drawback oil?
A. Yes, sir, the same as the bonded.
Q. At the tanks in Bayway and pipe lines and so on?
A. Well, they gauge the tanks for a delivery. And they seal the barge.

Q. Do you have to get withdrawal permits and all the other necessary clearance papers to take any oil out of a drawback oil tank?

A. No, sir.

Q. Don't have to get any of that?

A. No, sir. The only thing we have to do is to have an inspector down there to gauge.

Q. No permit necessary to withdraw at all?

A. No, sir. Not for drawback.

By Mr. Stockton:

Q. Is the drawback oil kept in separate tanks—segregated in separate tanks?

A. Yes, sir.

Q. So that it is always identifiable as drawback oil?

A. Yes, sir.

By Mr. Goodgold:

Q. What is the difference between bonded fuel oil and fuel oil that is not bonded in so far as its quality is concerned, if any?

A. I don't know exactly the answer to that.

Q. Is there any difference between——

A. No, the fuel oil is made up to a specification. You could make it from domestic crude probably or from an imported crude to meet the same specifications as your bonded fuel.

Q. It only becomes bonded fuel oil when it enjoys the privilege——

A. Because it is imported.

[fol. 256] Q. Because it is imported?

A. Without the payment of duty.

Q. Without the payment of duty?

A. That's right.

Q. Your company does not furnish or supply ships exclusively, or the French Line particularly, from sources in Bayonne and in Bayway, does it?

A. I don't get that question. What was that question again?

Q. The Standard Oil Company does not furnish fuel oil to the French Line exclusively from Bayonne or Bayway?

A. Well, that I wouldn't know.

Q. As far as your knowledge is concerned, they may or may not furnish such oil from other sources?

A. That I wouldn't know.

Q. They may or may not; you wouldn't know that?

A. No, I wouldn't know. The only thing I am interested in——

Q. You are located at Bayonne only?

A. No, sir, at 26.

Q. What?

Mr. Stockton: 26 Broadway.

Witness: Yes, sir.

Q. Then all you are testifying here is with respect to the matter pertaining to what constitutes bonded fuel oil and how it's delivered to the ships of various lines?

A. Yes, sir.

Q. You are not trying to testify now the Standard Oil Company makes all its deliveries from Bayonne or from Bayway?

A. I wouldn't know that because——

Q. You are not trying to state that for a fact?

A. No, sir.

[fol. 257] By Mr. Stockton:

Q. You also testified, of course, as to the drawback oil?

A. Yes, sir.

Q. The bonded oil is refined oil before it comes to the United States, is it not?

A. That's right.

Q. And the drawback is crude and is refined here in your refineries?

A. That's right.

Mr. Goodgold: I should like to take an adjournment at this time, Mr. Stockton.

Mr. Stockton: I think I am practically through, Mr. Goodgold. I just want to consult a moment on that. Yes, I am finished. You have finished cross-examination, I take it?

Mr. Goodgold: Yes, sir.

Mr. Stockton (to witness): Then I will excuse you.

Mr. Goodgold: May we have an adjournment at this time, please.

Mr. Stockton: Yes.

(Hearing adjourned to June 28, 1937, at 2:00 P. M.)

Hearing continued June 28, 1937.

Mr. Burke: This is a continuation of the hearing last held on June 25, 1937.

Mr. Stockton: Mr. Ficken recalled, please.

FRED W. FICKEN, recalled, testifies as follows:

By Mr. Stockton:

Q. Mr. Ficken, at the last hearing Mr. Jones testified with [fol. 258] regard to bonded oil and drawback oil. Can you tell us with reference to Exhibit 27 whether it is possible by the data on that to determine which of the oil deliveries furnished were bonded oil and which were drawback?

A. Yes. By reason of the points of origin here under the heading of "Refinery", there is marked "Bayonne" and "Bayway" and other points. At "Bayway", we did not during this period of time have bonded storage and that oil was of necessity drawback fuel.

Q. The diesel oil is all drawback, is it not?

A. Practically all drawback.

Q. That is, none of it is bonded?

A. Well, no. Diesel oil is either drawback oil or domestic fuel. By "domestic", I mean it is crude fuel oil produced from domestic crude.

Q. When you speak of this period, you mean——

A. The taxable period in all cases, I have it in mind.

Q. Can you say that all the oil furnished as shown in Exhibit 27 was either bonded or drawback?

A. With the exception of diesel fuel oil, I could say the Bunker "C" fuel oil or Standard Bunker Fuel Oil was all either bonded fuel or drawback fuel oil.

Q. And why is that furnished to the foreign steamers such as the French Line steamers in question?

Mr. Burke: Just what do you mean? Why is bonded oil furnished to them?

Mr. Stockton: Why is bonded oil furnished, yes.

The Witness: Well, for the reason of the large production, it is necessary for the Standard Oil Company of New [fol. 259] Jersey to dispose of and market their products of fuel oil which is produced—the crude of which is produced in a foreign country and refined in a foreign country and placed in a bonded warehouse in the United States.

Q. If that was furnished to other than foreign ships or for export, you would have to pay duty?

A. Well—no. You can supply that fuel oil to an American flag ship that is going foreign.

Q. Yes. By foreign ship I meant one that is going to a foreign port.

A. That's it exactly. Or the government permits supplying bonded fuel oil to ships going from the east coast to the west coast, for instance that is, through the Canal.

Q. Because there they touch a foreign port?

A. That's it exactly.

Q. The reason for furnishing bonded oil to the foreign going steamships is because that is a large and good source of marketing?

A. Well, I take it, Mr. Stockton, if I may put it this way; the bulk of our fuel oil is refined from crudes produced in Venezuela or foreign countries.

Q. And that was all during the taxable period, is that right?

A. Taxable period.

By Mr. Burke:

Q. Is this crude oil brought here in a crude state or is it refined in Venezuela before bringing it here?

A. The principal quantities, Mr. Burke, are brought here as bonded fuel oil, the finished product.

Q. Finished product?

A. Yes.

Q. Do you have your refineries in Venezuela?

A. In Aruba, Dutch West Indies. A little island about a hundred miles off shore.

[fol. 260] Q. So it is pumped from the tankers at your place in Bayonne—it is pumped as regular fuel oil suitable for use at that time in steamships or for any other domestic purpose you might want to use it?

A. That's correct.

Q. It doesn't have to be cracked?

A. No.

By Mr. Stockton:

Q. Well, have you finished your answer to my question, that is, that you use this bonded oil for steamships which are going to foreign ports because that's a good market?

A. Yes. Because I thought—I tried to say before that because of the larger—well, let me put it this way; that the principal fuel oil source is from Venezuelan crude.

Q. You can only sell that either for export or for ships that are going foreign or that touch a foreign port?

A. If we sell it domestically, then we have to pay a duty.

By Mr. Burke:

Q. It is suitable for domestic use, is it not?

A. Oh, yes.

By Mr. Stockton:

Q. Mr. Jones testified that where a ship was going to call at an American port before going foreign, the Federal authorities required an affidavit from the engineer of the ship that none of the oil was discharged in a domestic port. Is there any such requirement with regard to the amount of oil that may be burnt on steamers such as these French steamers while at dock in New York City?

A. No.

Q. That is, there is no duty on such oil and no report is required?

A. No, that oil is taken in as ships' stores.

[fol. 261] Q. Have you any other installations in the vicinity of the Port of New York besides those at Bayonne and Bayway?

A. Yes. At Jersey City there is a plant known as Eagle Works, but at that plant there is no fuel oil manufactured.

Q. Is that the only other plant in this vicinity?

A. Yes.

Q. How far away is the Bayonne plant from Piers 57 and 88, the French Line piers?

A. Oh, I'd say nine to eleven miles.

Q. And do you know approximately how big a plant there is at Bayonne?

A. You mean, Mr. Stockton, so far as storage capacity is concerned?

Q. Yes, with particular reference to the storage of fuel oil, marine fuel oil?

A. At Bayonne there is storage of bonded fuel oil approximating seven hundred fifty thousand barrels.

Q. Do you know about how many tanks that runs?

A. I'd say eight to nine tanks, but of course all this storage, you must bear in mind, is flexible. I mean one month we might use it for bonded fuel and subsequently in the month of August we might say we need one of these tanks for heating oil. We clean it out and reduce the storage. As I say, it's all flexible. At Bayonne there is a total storage of approximately eighty million barrels of all products and all of that storage, as I say, is flexible and may be——

Q. Which means approximately how many gallons?

A. Eighty million barrels, I would say. Oh, that might be a thousand tanks. Bearing in mind that these tanks hold anywhere from twenty thousand barrels to a hundred thirty-five thousand barrels.

Q. Now, the Bayway installation is located just where?

A. At Linden, New Jersey.

[fol. 262] Q. And where is that from Bayonne?

A. About three miles in a westerly direction from Bayonne.

Q. Further away from New York City?

A. Yes, from the piers in question.

Q. And is it on the Kill van Kull?

A. It is at the end of the Kill van Kull. I think you would say it's at the mouth of Staten Island Sound.

Q. The oil delivered as shown by Taxpayer's Exhibit 27 was brought in tank barges, as has been testified, of the Transportation Company; are those barges motor barges or how are they conveyed from your installations alongside the piers?

A. Well, they are called dead barges. That is to say, they are towed by a towboat.

Q. Also belonging to the Transportation Company?

A. Also belonging to the Transportation Company.

Q. And how do they proceed from Bayway and Bayonne to the Piers 57 and 88, directly or by any intermediate stops?

A. No. They are taken directly to the vessel requiring the fuel, by a towboat.

Q. That is the regular practice?

A. That is the ordinary and regular practice.

Q. Are they brought alongside or near the vessel long in advance of the vessel's arrival and bunkering?

A. The common practice would be, for instance, if the vessel is to dock say at nine o'clock in the morning, we'll

take the French Line now and during this period in question, if one of the French Line vessels was to dock on the south side of, say, Pier 57 at nine o'clock in the morning, the barges might be placed on the north side of 57, out of the way of the ships approaching the pier, so that it would not be in the way of maneuvering. The barge would [fol. 263] be there perhaps a half an hour or perhaps an hour before the vessel actually docked.

Q. Is there any reason for not having the barges wait around for any considerable length of time?

A. Well, in so doing you would accrue demurrage.

Q. And is demurrage charged by the Transportation Company to the Standard Oil Company of New Jersey on the barges and on the tugs?

A. It is.

Q. With regard to shut outs, there has been some testimony as to the possibility of the barge having oil which is shut out from one ship staying over in New York waters, near the New York piers, and loading it onto another ship; is that customary or usual or done at all?

A. Very unusual.

Q. What is the usual practice, then, if there is a shut out?

A. A stipulated quantity as required by the ship or as ordered by a steamship company is loaded into the barge. That particular quantity is pumped out of the barge into the ship and the barge tanks are what we commonly call clean or dry.

Q. If, for any reason, there should be any overage there, what is done with that on the barge?

A. That normally in practically all cases is brought back to the refinery or its point of origin.

Q. Do these companies which have been mentioned, the Gulf Oil Company, the Shell Union, and the Mexican Petroleum and the Standard Oil Company of New Jersey, are they competitors?

A. Indeed they are.

Q. Can you tell us about how many steamship lines in round numbers you had on your accounts during this tax period?

[fol. 264] Mr. Burke: What is the purpose of this testimony?

Mr. Stockton: This is to show the extent of business and it has a bearing on the knowledge in the trade.

Mr. Burke: It seems to me that we are not particularly interested in what sales are made by the Standard Oil to other steamship companies or how much oil they supply. The only question here is what's to be done with the oil supplied to the French Line.

Mr. Stockton: There may be questions as to the extent of the knowledge in the shipping community as to the conditions affecting interstate transactions here.

The Witness: I would say in excess of a hundred.

By Mr. Stockton:

Q. There was testimony here by Mr. Hammel and he referred this matter to your knowledge with reference to Exhibits 21 and 22, as to the figures in the last column of those two barge loading sheets. Opposite the barge 11 the Paris entry, the figures appear to be 15.5, 230 and 65; can you explain those?

A. The first figure of 15.5—well, as a matter of fact, all of the figures represent an analysis of the fuel oil that was delivered. The first figure is an indication of API gravity—American Petroleum Institute abbreviated—gravity. The second figure is the flash point, and the last figure of 65 is the viscosity in seconds.

Q. That is referring to Exhibit 22?

A. Yes.

[fol. 265] Q. As to viscosity, Mr. Castelnau testified with regard to some investigations of his into viscosity of Shell Oil Company's marine fuel oil. Can you tell us how the viscosity of that in general compares with that furnished by the Standard?

A. Well, to my knowledge, the principal supplies, or the bulk of their supplies exceed in viscosity considerably fuel oil which is supplied by the Standard Oil Company of New Jersey.

Mr. Goodgold: Well, I think the answers of the witness are too general entirely. I think if they are to be admitted in the record at all we should have definite figures showing that this witness has a definite knowledge of the matters he is talking about.

Q. Do you have knowledge of comparative viscosity of the Shell Oil product and the Standard Oil product?

A. Yes, I have, because it's part of my business to know.

Q. I'll put the question again. Will you tell us how you

are qualified to testify as to the product of the Shell Oil Company, specifically, marine fuel oil, and on its viscosity?

A. It's part of my work to keep myself informed as to the activities of competitors.

Q. And does that include the products that they sell?

A. The fuel oil products.

By Mr. Burke:

Q. Do you obtain from your competitors analyses of their oil?

A. No.

Q. Do you have any analyses of your competitor's oil in your possession?

A. I see them from time to time.

[fol. 266] By Mr. Stockton:

Q. What do you find by those analyses, Mr. Ficken?

A. That ordinarily the viscosity of the Shell Company's fuel oil is greater in seconds than the fuel oil sold by the Standard Oil Company of New Jersey.

Q. Can you express that in figures as Mr. Goodgold suggests with reference, for instance, to viscosity of 65 shown in Exhibit 22; what have you found the Shell Oil viscosity runs to?

A. In some cases, I found it to run close to 300 seconds.

Q. And have you found similar viscosity in marine fuel oil of the Gulf or the Mexican Petroleum?

A. Yes, theirs normally runs in excess of the fuel that we produce.

Q. The French Line invoices that have been put in evidence here and testified about were all paid in the regular course, were they not?

A. Yes.

Q. To make the record clearer, Mr. Hammel testified with regard to three instances of deliveries shown in Exhibit 27, the deliveries by the Standard Oil Company of New Jersey of fuel oil from the Gulf plant, from the Mexican Petroleum plant and from the Shell Union plant. He testified that he had made changes in the orders and lighter orders after those orders for the fuel oil had been received by the Standard Oil Company of New Jersey from the French Line; can you tell us the exact procedure that is followed in such instances where there is a change of the source from which the oil is to be supplied?

A. Well, it's possible that we have made an arrangement——

[fol. 267] Mr. Goodgold: I strike it out. This witness doesn't know of his own knowledge. I don't see what relevancy his answer has.

Q. Do you know what happened in regard to the three deliveries in the taxable period from these outside companies?

A. Yes. We purchased and we borrowed fuel oil from the respective companies.

Q. And exactly what procedure was followed in the making of those deliveries as between you and the routing carried on by Mr. Hammel?

A. Mr. Hammel is advised instead of loading a certain quantity of fuel oil at Bayonne, he is to load a certain quantity of fuel oil at the Mexican Petroleum Company's storage at Carteret, or Shell or Gulf as the case may be, as indicated.

Q. And was that advice given to him before or after he made out the first order?

A. After.

Q. And he then made his correction accordingly as he testified?

A. Correct.

Q. Now, have you found out why these five deliveries were made from these companies other than the Standard Oil of New Jersey as shown in Exhibit 27?

A. Yes, I have.

Q. Before I ask you why let me straighten out the record in one particular. The supply furnished from the Mexican Petroleum was two barges, was it not, 57 and 58 on the 30th of July, 1935?

A. That's right.

Q. And was that one order or two orders?

A. That was one order.

Q. Order 4096?

A. That's right.

Q. And in regard to the oil from the Gulf on September 24th and 25th by barges 124 and 105, is that one order or [fol. 268] two orders?

A. That is one order.

Q. Order #5126?

A. Yes.

Q. And the oil supplied from the Shell plant to the Champlain August 31, 1935, was one barge and one order, 4715, is it not?

A. That is correct.

Q. Will you state why the oil was supplied from those companies instead of from the Standard Oil Company of New Jersey plant on those occasions?

A. Because at that time we were short of fuel oil and borrowed the quantities from Mexican Petroleum Company and from the Gulf Refining Company and purchased outright that quantity which we took from the Shell Petroleum Company's plant.

Q. You have stated that the major part of your duties was to solicit the sale of marine fuel oil. Will you tell us what company's oil you are engaged in selling?

A. Standard Oil Company of New Jersey.

Q. Do you solicit the sale of marine fuel oil of the Gulf Oil Corporation?

A. No.

Q. Of the Shell Union Oil Corporation?

A. No.

Q. Of the Mexican Petroleum Corporation?

A. No.

Q. What is the meaning of the term "Standard Bunker Fuel Oil"?

A. It's a brand name.

Q. Brand name for what oil?

A. Standard Oil Company of New Jersey fuel oil.

Q. Is the marine fuel oil sold by the Gulf Oil Corporation, the Shell Union Oil Corporation or the Mexican Petroleum Corporation called Standard Bunker Fuel Oil?

A. No.

[fol. 269] Q. Referring to Taxpayer's Exhibit 27, with the exception of the one delivery from the Shell plant at Bayonne, New Jersey, the two deliveries from the Gulf plant at Gulfport, Staten Island, and the two deliveries from the Mexican Petroleum plant at Carteret, New Jersey, what company's oil was delivered on the remaining 99 or 100 deliveries?

A. The Standard Oil Company of New Jersey's products.

Q. That is, Standard Bunker Fuel Oil?

A. Standard Bunker Fuel Oil.

Q. Referring to Taxpayer's Exhibit 1, where the contract provided for maximum quantity two million barrels Stand-

ard Bunker Fuel Oil, were these 99 or 100 deliveries made of the Standard Bunker Fuel Oil to which you have referred or of some other description of oil?

A. Standard Bunker Fuel Oil.

Q. In the case of the delivery on July 30, 1935, by barge 57 to the Normandie of oil from the Mexican Petroleum plant at Carteret, New Jersey, was that a delivery of the Standard Oil Company of New Jersey's bunker fuel oil or the Mexican Petroleum Corporation's fuel oil?

A. It was the Mexican Petroleum Company's fuel oil.

Q. And does the same answer with the obvious change apply to the delivery by barge 58 to the Champlain of oil on August 31, 1935, from the Shell plant at Bayonne. In other words, you were delivering the oil of what company at that time?

A. The Shell Petroleum Company's.

Q. And with regard to the deliveries to the Champlain on September 24th and 25th, you were delivering the oil of what company?

A. The Gulf Refining Company.

[fol. 270] Mr. Stockton: That's all for this witness.

By Mr. Stockton:

Q. Just a minute. Do you know Mr. Ficken whether when there is an overage or shut out from the ships so that there is oil left in one or more tanks of the barge, are those tanks sealed again by the customs officer?

A. Yes, after they are finished pumping alongside the ship.

Q. The shut out or overage is sealed into the barge?

A. That's right.

Q. And then the barge is returned to the point of origin?

A. That's right.

Mr. Stockton: That's all.

By Mr. Burke:

Q. Now, Mr. Ficken, you have testified that the Standard Oil Company of New Jersey has plants in Bayonne and Jersey City where bonded fuel oil is kept?

A. Yes.

Q. Are those the only plants you have in this part of the country for bonded fuel oil?

A. I think, Mr. Burke, you misunderstood or else I did not make myself clear.

Mr. Goodgold: Well, just answer the question yes or no.

The Witness: There is no bonded fuel oil in Jersey City.

Q. There is bonded fuel oil at Bayonne and Bayway?

A. Only at Bayonne.

Q. Have you any other source of supply of bonded fuel oil beside the plants at Bayonne?

A. Not in the metropolitan area.

[fol. 271] Q. Yet you are able to deliver particularly to the French Line, as indicated by Taxpayer's Exhibit 27, bonded fuel oil from other sources, namely, the Shell, the Gulf, the Mexican Petroleum, is that not so?

A. If we are short of fuel oil, and it is necessary for us to purchase, yes, and if they have it for sale.

Q. Does the contract with the French Line require that the bonded fuel oil sold to that company can only come from your Bayonne plant?

A. No, it does not.

Q. It can come from any source of supply where you are able to obtain it, isn't that so?

A. That's right.

Q. You also testified, I believe, that you have at Bayonne eight or nine tanks used for bonded fuel oil, the capacity of which varies from time to time? Is that correct?

A. That's correct.

Q. Are those tanks sufficient to supply all the needs of the Standard Oil Company of New Jersey to fill the orders for bonded fuel oil?

A. Substantially.

Q. At all times?

A. Yes.

Q. When the oil is loaded into barges it is directed that delivery be made to a ship at its pier in New York City, does it ever happen that the barges are kept in the harbor awaiting the arrival of a ship after having been loaded?

A. For very short periods of time.

Q. Are they ever kept overnight?

A. At the refinery they would be.

Q. How about out in the harbor awaiting the arrival of the ship?

A. No.

Q. Or at the pier waiting for the boat in the morning?

A. For very short periods of time.

[fol. 272] By Mr. Goodgold:

Q. How long is the longest time they would be kept waiting?

A. Well, Mr. Goodgold, you know and I know that ships are kept out in the harbor because of fog. We come to a pier before fog has set in and it might be six or eight hours.

Q. Before the ship can get into the harbor?

A. Yes.

Q. And all that time the barge is waiting with the oil at the pier?

A. Yes.

By Mr. Burke:

Q. Does it always happen the barges are at the piers before the ships arrive, do you make it a practice to have them there?

A. We try to.

Q. The testimony has before been given that the barge never arrives before the ship has been docked. Is that correct testimony?

A. Well, we try to have them there before or as near as possible to the time of the arrival of the ship.

Q. When you load a barge with fuel oil for delivery to a ship, does it ever happen that you load sufficient fuel oil to take care of two ships?

A. It has happened.

Q. During the taxable period did it happen?

A. I think it did in one case that I know of.

Q. What is the procedure when that takes place?

A. That tank is sealed after it makes its first delivery. The barge tanks are sealed after it makes the first delivery. It was taken away to Weehawken, which is a favorable anchorage for barges and the following morning it was brought back to a New York City pier and seals broken [fol. 273] again by the customs official and the delivery—and the balance of the order removed from the barge.

By Mr. Stockton:

Q. I ask if that delivery was under the French Line contract?

A. I think one was, yes. This particular one was.

By Mr. Goodgold:

Q. In other words, as I understand it, the barge came into the harbor of New York with a sufficient supply to load more than one ship. After the first ship was loaded in the harbor of New York, the tanks of the barge were sealed and then the barge proceeded to Jersey—New Jersey, and then subsequently returned to the Harbor with the same oil—to the harbor of New York—and the second ship was loaded.

A. Well, Mr. Goodgold, the barge has never been out of the harbor of New York.

Q. In other words, the barge stays in the harbor until the second loading is completed?

A. Well, the barges never go out of the harbor—the harbor proper, as you would call it.

Q. I mean the pier in New York?

A. That is different.

Q. Alongside the piers on the New York side?

A. Yes.

Q. What is the answer to that?

A. The answer is the barge is taken alongside the first ship and delivery concluded after the seals are broken. The seals are put on again after the first delivery and that barge is taken away from the piers.

Q. Where does that barge go?

A. It might go to Weehawken; it might come back to Bayonne.

[fol. 274] Q. And it may remain at the pier or go to the next pier where the next ship is to be loaded?

A. And shifted back from Weehawken to the next ship or second ship.

Q. Is it also possible that the barge may be towed to another pier to load another ship on the New York side?

A. That's exactly what has happened.

Q. In other words, the barge doesn't always go back to Jersey. It may be towed to the very next pier at the time when the first loading is completed?

A. I know of only one case of that kind.

Q. Well, that does happen, does it not?

A. Once it happened. That was because of an error in quantity loaded in the barge.

Q. Well, we didn't ask you that question before. The question that was asked of you before was whether or not

it isn't a practice of your company—I don't say a general practice but a practice which is frequent—of loading a barge to supply more than one vessel?

A. It is not a practice.

Q. How many times have you done it?

A. To my knowledge, once.

Q. Throughout the entire history of the company?

A. No.

Q. How many times throughout the entire history of the company since you were there?

A. Before we were permitted to deliver bonded fuel oil for ships, it was the practice then to load the barges to capacity and that barge would make one or five deliveries, perhaps, to various piers in New York and the Jersey side of the Hudson River or the East River—before we were permitted to deliver bonded fuel oil.

[fol. 275] Q. You haven't answered my question.

A. Yes, I have.

Q. I asked you this question. If you have an order to load more than one ship either for the same company or for two companies or more than two companies and you can conveniently load it all on one barge so that you can then make one trip from your points of origin or your sources of supply to the ships tied up alongside New York piers, do you do that?

A. No.

Q. You never will take an order—you will never load a barge to fill more than one ship?

A. No.

Q. Although you testified a few minutes ago that you have done that? A. We did it once during the period in question and that was done because of an error.

By Mr. Burke:

Q. What is done, Mr. Ficken, with the shut out oil? Assuming that a barge has an overage, do you take the barge back to the refinery and then reload oil in the barge for the next delivery?

A. We reload oil into that barge from a bonded warehouse.

Q. And do you reload the barge with the shut out oil still in the barge?

A. Yes.

Q. You don't pump it out first into your tanks and then reload it again?

A. No.

Q. You measure what's already in the barge?

A. In the barge.

Q. And then load sufficient from your tanks to meet the requirements of the order, is that correct?

A. That's correct.

Q. Do other companies sell bonded fuel oil to other customers—steamship lines in the harbor of New York?

[fol. 276] A. Yes. Other companies supply bonded fuel oil.

Q. Well, do they sell the same customers whom you supply?

A. No.

Q. Are all of your contracts with all of your customers exclusive contracts?

A. Practically all. I know of only one contract which is not.

By Mr. Goodgold:

Q. Which one is that?

A. That has nothing to do with the French Line.

Q. Well, I didn't ask you that. Which one is that? Let your counsel take care of correcting my question. You are not here in the part of an attorney. You are here as a witness.

Mr. Stockton: There may, however, be an objection to the witness answering such a question on account of revealing secrets or something of that sort.

Q. Does your company supply fuel oil to the ships of the American West African Line?

A. No.

Q. Supposing I showed you positive proof and testimony given at hearings here by the American West African Line that your company does sell them. Would you deny such statements?

A. No.

Q. Is it a fact or isn't it a fact that you do?

A. I believe that the Standard Oil Company of New York supplied the American West African.

Q. Does not the Standard Oil Company of New York obtain that oil from Standard Oil Company of New Jersey [fol. 277] in supplying that oil to the American West African Line?

A. I could not testify to any specific delivery. Unless it is a specific delivery.

Q. It consists of several deliveries made during the period from December 10, 1934 to December 31, 1935.

Mr. Stockton: I object to this line of questioning as irrelevant and immaterial.

Mr. Goodgold: It is relevant to show the credibility of this witness' testimony because we have information given to us by other people connected with the Standard Oil Company that they do make sales to companies who purchase oil also from other oil supply companies and I mention specifically the American West African Line to whom the Standard Oil Company of New Jersey sells the oil through the Standard Oil Company of New York.

Q. I ask you now is that a fact or isn't it a fact that the Standard Oil Company of New Jersey sells oil to the American West African Line?

A. No.

Q. You say that is not a fact?

A. I don't believe that we—I mean the Standard Oil Company of New Jersey—hold a contract.

Q. I didn't say that. I say that you furnish that oil to the company through the Standard Oil Company of New York.

Mr. Stockton: That wasn't the question. The question was whether they sold to the American West African Line. The witness answered "No", and apparently he is right.

[fol. 278] Q. Supposing I show you billings from Standard Oil Company of New Jersey to the American West African Line. Would you deny those were the billings?

A. No.

Q. At the next hearing, I will submit such billings by the Standard Oil Company of New Jersey showing that that company is delivering oil to the American West African Line through the Standard Oil of New York. Are there any other companies which the Standard Oil of New Jersey sells where other oil supply companies make sales also to the same companies—same steamship companies?

A. Your question isn't quite clear to me, Mr. Goodgold.

Q. I say, are there any oil companies other than the Standard Oil of New Jersey who furnish fuel oil to your customers? That's your original question.

Mr. Burke: He answered it and said yes.

The Witness: Yes, there are.

Q. What other companies are there?

A. Red D Line.

Q. Are there any other companies?

A. Not to my knowledge.

By Mr. Burke:

Q. I call your attention to Taxpayer's Exhibit 27 in Evidence with specific reference to the delivery of oil made on August 31st from Shell to steamship Champlain. I ask you whether or not an analysis of the oil so furnished was given to the French Line?

A. Yes.

Q. Is this a photostatic copy of the analysis?

[fol. 279] Mr. Goodgold: I may state that that has been submitted in the record as the analysis and was so submitted by the Taxpayer himself.

Mr. Stockton: We don't deny that.

The Witness: That's correct.

Q. Now, looking at that analysis, is there any difference between the analysis of that fuel oil which was furnished to the French Line from the Shell refineries and any analyses of such fuel oil furnished from the Standard Oil of New Jersey?

A. This—the only indication here is shown by the item Viscosity at 122° Fahrenheit.

Q. Well, that is indicated, is it not, as Standard bunker fuel?

A. That's right.

Q. But it is not Standard bunker fuel oil?

A. No.

Q. Did it serve the French Line purposes?

A. It did.

Q. Was it rejected for any reason?

A. No.

Q. It was used as far as you know in the propulsion of the steamship Champlain?

A. Yes.

Q. It met all the requirements necessary to the French Line, did it not?

A. Yes.

Mr. Stockton: I object to that, if he knows——

Q. Do you know whether it did or not?

A. I haven't heard that there was any complaint.

By Mr. Goodgold:

Q. Do I understand now that although you represented this as Standard fuel oil, it was not Standard fuel oil?

A. That's right.

[fol. 280] Q. But nevertheless it met all the requirements and the company accepted that?

Mr. Stockton: I object to that question because the witness said he didn't know.

Mr. Goodgold: The witness didn't say anything of the kind.

Mr. Stockton: He did say exactly that thing.

Mr. Goodgold: He did say it did not represent Standard fuel oil although it was analyzed as being Standard fuel oil. Is that correct?

The Witness: At the time this delivery was made, this was Standard bunker fuel oil because we bought it.

Q. What do you mean "at the time"? After it has been used up, it is no longer Standard fuel oil?

A. It is nothing after it has been used up.

Q. It was sold as Standard fuel oil, is that correct?

A. That is correct and it was Standard fuel oil because it was the property of the Standard Oil Company of New Jersey at the time it was delivered.

Q. In other words, do I take what you say to mean this: That when oil is purchased by the Standard Oil Company of New Jersey from another company and no matter what that oil is, if it is once purchased by the Standard Oil Company of New Jersey and then resold to a steamship company, it becomes Standard Bunker Fuel Oil?

A. That's right, because it has to meet the specifications of Standard Bunker Fuel Oil.

Q. So that this standard fuel oil is obtainable from a great number of sources. In other words, it is ordinary oil which [fol. 281] meets a certain specification for the Standard Oil

Company of New Jersey after which it is termed Standard Bunker Fuel Oil?

A. After it meets the specifications.

Q. I ask you now, is the oil represented by this analysis on Taxpayer's Exhibit 33-B Standard Fuel Oil—Standard Bunker Fuel Oil?

A. That meets standard bunker oil specifications.

Q. Answer my question, please. That is Standard Bunker Fuel Oil?

A. Yes, it is.

Q. And was obtained from a source other than from that owned and operated by the Standard Oil Company of New Jersey?

A. That's right.

By Mr. Burke:

Q. I refer you again to Taxpayer's Exhibit 27 in Evidence with particular reference to the deliveries made on September 24th and 25th to the steamship Champlain from Gulf and I ask you whether or not an analysis of the oil so delivered was furnished to the French Line at that time?

A. That's correct.

Q. I show you Taxpayer's Exhibit 31 in Evidence and I ask you if that was the analysis that was furnished?

A. It is.

Q. Does that meet all the specifications of the Standard Bunker Fuel Oil?

A. It does.

Q. And it is Standard Bunker Fuel Oil for all purposes?

A. It is.

Q. But there is no denying it, is there, that the oil itself did not come from the Standard Oil Company of New Jersey refineries but came from the Gulf Refinery at Staten Island in New York City?

A. No.

Q. Representation was made that that was standard bunker oil of the Standard Oil Company of New Jersey?

A. Yes.

[fol. 282] Q. Did it meet all the specifications of the French Line in their contract with the Standard Oil Company of New Jersey?

A. It did.

Q. I show you Taxpayer's Exhibit 25 in Evidence which is an analysis of fuel oil furnished to Steamship Paris on

December 14, 1934, and ask you if that is an analysis to the French Line of oil delivered on that day?

A. That's correct.

Q. Is there any difference of any kind with the exception of what you say about viscosity, in the Standard Bunker Fuel Oil furnished to the Paris on that date and in the oil furnished to the Champlain on the dates of September 24 and 25, 1935, and August 31, 1935, Taxpayer's Exhibits #31 and 33-B in Evidence?

A. Principally in respect to viscosity.

Q. That's the only difference?

A. That's right, and in one case the gravity is somewhat lower, in the delivery to the Champlain.

Q. I also show you Taxpayer's Exhibit 34-C in Evidence and ask you if that is an analysis furnished to the French Line covering fuel oil deliveries to the Normandie?

A. It is.

Q. That fuel oil, according to Taxpayer's Exhibit #27, came from the Mexican Petroleum refinery in Carteret, New Jersey, is that correct?

A. That's right.

Q. Yet it was represented to the French Line as being Standard bunker "C" fuel oil, is that right?

A. That's correct.

Q. Did that oil meet all requirements of the French Line under its contract with your company?

A. It did.

Q. I ask you to look at those four analyses that I have just presented to you including the one of the Standard Oil [fol. 283] Company of New Jersey's own oil and I ask if with the exception of viscosity, is there any distinction between the oils delivered?

A. Nothing of any particular consequence at all.

Q. And all of those oils could be used for the purpose for which they were bought, could they not, propulsion of the steamships of the French Line?

A. They can be used.

Q. And they were used?

A. That's right.

Q. Do you know whether or not they met the requirements of the French Line?

A. I know they met their requirements.

By Mr. Goodgold:

Q. And were they all represented as Standard Bunker Fuel Oil?

A. That's right.

By Mr. Burke:

Q. Now, outside of the fact that the Standard Oil have to represent the Standard Bunker Fuel Oil as a brand, is there any difference between that fuel oil and other companies' with the exception of viscosity?

A. No. They are substantially the same.

Q. And the viscosity can be overcome by adjustment of the burners of the ship, can it?

A. With some difficulty, yes.

Q. But in those cases, it was done satisfactorily, was it not?

A. It was done. Apparently it was done.

Q. And so far as you know, there was no objection to the type of the oil furnished?

A. They—I might add here that the French Line did not like the viscosity in excess of 200 seconds.

Q. Was the viscosity furnished in all of those cases less than 200?

A. In one case it is less than 200.

[fol. 284] Q. Referring to Taxpayer's Exhibit 33-B; that's the oil from the Shell. But with that exception, the oil is the same?

A. Substantially the same.

Q. Now, will you describe viscosity? What do you mean by it?

A. Viscosity is fluidity, Mr. Burke. It's the rate—the speed or the rate of time it takes for a given quantity——

Mr. Lord: To flow.

A. (Continuing) to flow into an orifice of a certain capacity.

By Mr. Stockton:

Q. At a certain temperature?

A. At a certain temperature.

By Mr. Burke:

Q. That viscosity varies depending upon the temperature, is that so?

A. Yes.

Q. So that at greater or lesser temperatures the viscosity changes and it can be used for the purpose for which it is intended?

A. Under some difficulties, yes.

Q. Were the deliveries made to the French Line from the refineries of the Mexican Petroleum, Shell Oil Company and the Gulf Oil Company, all deliveries made pursuant to the contract your company had with the French Line, Taxpayer's Exhibits #9 and 10 in Evidence? (Handing papers to witness.)

A. Now, your question again, Mr. Burke?

Q. Was the volume of fuel oil delivered to the French Line by your company from the refineries of the Mexican Petroleum, the Shell and the Gulf Oil Companies made pur- [fol. 285] suant to terms in the contract represented by Taxpayer's Exhibits #9 and 10?

A. Yes, that's so.

By Mr. Goodgold:

Q. There were no other contracts?

A. No.

Q. You are sure of that?

A. I know that. Other than verbal agreements.

Q. Are you now trying to tell us there is another contract?

A. There is no other contract.

Q. Verbal or written?

A. There is no other contract.

Q. I thought you were trying to tell us now of a verbal agreement other than the written agreement which is now in effect pursuant to which you make sales.

Mr. Burke: All right. That's all I have.

Mr. Stockton: I have a few more questions for Mr. Ficken.

By Mr. Burke:

Mr. Ficken, was the bonded fuel oil that was delivered to the French Line from the Mexican Petroleum Company at

Carteret, and the Gulf Company at Gulfport, Staten Island, represented to the French Line as having come from the Bayonne refinery of the Standard Oil Company of New Jersey? I show you the analyses—Taxpayer's Exhibits #34-C and 31.

A. Yes.

Q. They were never in the Bayonne refinery at any time?

A. No.

Q. Delivered directly from the refineries of the outside companies to the steamship?

A. Yes.

[fol. 286] Q. The same thing holds good from the other places at——

A. Yes.

Q. It did not go to the Standard Oil refinery first before delivery, did it?

A. No.

Mr. Burke: That's all.

By Mr. Stockton:

Q. You referred to the time when the delivery of bonded fuel oil to ships going to foreign ports was first permitted. When was that?

A. In August, 1932.

Q. And that is the period that you referred to later when you said that once during the period there had been some transfer through error of a barge from one ship to another without going back to New Jersey?

A. That was during the taxable period in question here.

Q. Now, is the regular course of business in the Standard Oil Company to keep any records which show the sales made to the French Line for the period covered by the contract in question and the contracts incorporated by reference in the current contract, that is, for the period 1928 to 1934, inclusive?

Mr. Burke: Mr. Stockton, I think Mr. Hammel answered that question at the last hearing. You are putting all these documents as being entries made in the regular course of business. I don't know whether this man can add any more to that.

Mr. Stockton: Well, he knows much more about it than Mr. Hammel does. And we, at that time, postponed fur-

ther questions on that ground as we said we would produce [fol. 287] the records at this hearing. (To reporter.) Will you read that question?

(Question repeated.)

"Question: Now, is the regular course of business in the Standard Oil Company to keep any records which show the sales made to the French Line for the period covered by the contract in question and the contracts incorporated by reference in the current contract, that is, for the period 1928 to 1934, inclusive?"

The Witness: Yes.

Q. What records are kept during the regular course of business?

A. Individual deliveries with detailed information is posted on a sheet and kept intact by months and over a period of a calendar year.

Q. And those are on looseleaf ledgers?

A. They are.

Q. And those are kept permanently in your office?

A. In the fuel oil department.

Q. In your department, I mean, by your office?

A. Yes.

Q. And who has charge of those records?

A. Mr. Hammel.

Q. Just what time is the posting done with regard to any particular transaction?

A. Immediately following the delivery or immediately upon receipt of the delivery ticket, the sample of which I gave.

Q. That is upon receipt of the delivery ticket signed by the engineer?

A. That's right.

Q. Constituting a receipt; then you say——

Mr. Goodgold: Just a minute, Mr. Stockton. I don't want [fol. 288] to interrupt but I think you are making the record—this is off the record.

(Discussion off the record.)

Q. Have you produced some sheets of looseleaf records, Mr. Ficken, from the records of your department?

A. Yes.

Q. And are these the records you refer to?

A. They are.

Q. What do they cover?

A. They cover deliveries to the French Line vessels at various ports during various calendar year periods.

By Mr. Goodgold:

Q. Do you make these entries on the record?

A. No.

Q. Who makes these entries on the record?

A. You are speaking now, Mr. Goodgold, of the tax——

Q. Who makes the entries on the record?

A. Various people.

Q. But you had nothing to do with the making of the entries?

A. Not the original entries, no.

Q. And all you can testify now is what you see on those sheets now?

A. No. I can even go further than that because, as a matter of fact, I instituted this system.

Q. But you had nothing to do with making entries on the record?

A. That's correct.

Mr. Goodgold: That's all.

By Mr. Stockton:

Q. Now, the entries on these sheets were made after you established this system and were made while you were [fol. 289] head of the department, is that it?

A. Yes.

Q. And what subordinate had the duty of making those; what was his position?

A. During what period?

Q. During the whole period from 1928 to 1934?

A. Well, there are various people in the office.

Q. Yes. I mean what position do they hold? Are they accountants or clerks?

A. They are on the shipping and order desk—clerks.

By Mr. Goodgold:

Q. These records that you have before you refer to a period ending in 1934 prior to the date under review, is that correct?

A. They are for periods including a portion of that under review.

Q. What portion?

A. For the last part of 1934.

Q. The records you have before you have no entries in them with respect to the period in 1935?

A. I don't find them here.

Q. And the testimony you are giving us is based solely on what is before you and not on anything which you have personally done on those records?

Mr. Stockton: I object to that. The testimony he has given has established that these records are kept in the regular course of business.

Mr. Goodgold: There has been no such evidence given. I am asking the witness specifically whether he himself made any of these records—any of the entries on the records before him.

[fol. 290] Mr. Stockton: What is that relevant to, Mr. Goodgold?

Mr. Goodgold: Just as relevant as your questions.

Mr. Stockton: May I call your attention to the provision of the Civil Practice Act 374-a? If you have forgotten, that is the section of the Civil Practice Act which covers this point.

Mr. Goodgold: All right. You can dispute that as a matter of law. I am asking this witness a specific question.

By Mr. Goodgold:

Q. Did you make any of the entries on the record before you now?

A. No.

Mr. Stockton: I excuse this witness.

Q. Any entries that have been made on this record were made by others than you?

A. That is correct.

Q. And you did not supervise the making of these entries between the beginning of 1928 and 1934?

A. Yes, sir, I did.

Q. In what way did you supervise the making of these entries?

A. I started the system of entries that is before me now.

Q. And in what way did you supervise the making of the actual entries that appear on the record?

A. At the end of the month, I would go over these records.

Q. You did not supervise the making of entries while they were made?

A. No.

Mr. Stockton: Now I excuse you, Mr. Ficken. That is all I have. Have you any other questions?

[fol. 291] Mr. Goodgold: No, I have no other questions.

Mr. Stockton: I will recall Mr. Hammel.

ALBERT J. HAMMEL, recalled, testifies as follows:

By Mr. Stockton:

Q. Mr. Hammel, you have heard the testimony of Mr. Ficken in regard to the keeping of these records?

A. I have.

Q. I show you the papers that he produced and was testifying about. Where did those come from?

A. They came from our record books. Fuel oil record books.

Q. Did you, yourself, take them from the fuel record books?

A. I did.

Q. Do they all relate to the French Line contract?

A. They do.

Q. Are there any others in those records besides these that relate to the contract from the years 1928 to 1934, both inclusive?

A. Any other what?

Q. Any other record sheets?

A. No. Only the French Line contracts.

Q. And for that period?

A. Yes, sir.

Mr. Stockton: I offer those in evidence.

(Discussion off the record.)

Q. Well, these are the same records that have been testified to by Mr. Ficken; you have heard that and that's a fact, is it not?

A. It is.

Mr. Stockton: All right. I'll offer those in evidence.

[fol. 292] Mr. Goodgold: How many sheets have you got?

(Counts sheets.) 34 sheets.

(Discussion off the record.)

Mr. Burke: Mark them in evidence.

(Received and marked Taxpayer's Exhibit #35 in Evidence—34 sheets.)

By Mr. Stockton:

Q. Now, Mr. Hammel, have you at my request gone through those sheets, Exhibit 35 consisting of 34 sheets, to ascertain how many of the deliveries during the years 1928 to 1934 inclusive—

Mr. Burke: '35 inclusive.

Mr. Stockton: '34 inclusive.

(Discussion off the record.)

Q. Has this Exhibit 35 consisting of 34 sheets been kept as records in the regular course of business and has it been your regular course of business to do just as you did with the other records that you testified to before?

Mr. Stockton: This is known as Taxpayer's Exhibit #35 in Evidence, 34 sheets.

The Witness: We have, yes, sir.

Q. Can you state from those records how many deliveries were made to the French Line under their contract during the year 1928?

A. From outside suppliers, is that right, sir?

Q. Well, made from any source.

A. 141.

Q. How many of those deliveries were made from the installation plant of some company other than the Standard Oil Company of New Jersey?

A. None.

[fol. 293] Q. Both as to bunker and diesel fuel oil?

A. Yes, sir.

Q. With regard to the year 1929, will you give the same information?

A. We made 129 deliveries from the Standard Oil Company of New Jersey installation.

Q. And how many from other installations?

A. One.

Q. And that was made from where?

A. Tidewater Oil Company, Bayonne.

Q. Located at Bayonne, New Jersey?

A. Yes, sir.

Q. And as to diesel fuels?

A. There were no deliveries.

Q. Give the same information for the year 1930.

A. Standard Oil Company of New Jersey——

Q. Made how many deliveries?

A. Made 143 from their own installations. Tidewater Oil Company made one from Bayonne, New Jersey.

Q. That is the Standard Oil Company of New Jersey made one from the Tidewater plant at Bayonne, New Jersey, is that right?

A. Bayonne, New Jersey, yes, sir.

Q. How many diesel fuel oil deliveries were made that year?

A. Ten.

Q. And how many were made from Standard Oil Company of New Jersey installations at Bayonne or Bayway?

A. Ten.

Q. How many from outside suppliers?

A. None.

Q. Give me the same data with respect to the year 1931.

A. Standard Oil Company of New Jersey made from their own installations 138. They made from Barber Asphalt Company terminal at Maurer, New Jersey, one. Now, diesel fuel oil——

[fol. 294] Q. For the same year?

A. For the same year. From the Standard Oil Company of New Jersey installations, 15. From outside suppliers' installations, none.

Q. And the same data for the year 1932.

A. 1932. Standard Oil Company of New Jersey from their own installations, 122. None from outside suppliers.

Q. And how about diesel that year?

A. On diesel fuel, one from Standard Oil Company of New Jersey installation. 1933, from the Standard Oil Company of New Jersey installations, 92. None from outside suppliers' installations.

Q. That is of bunker oil?

A. Yes, sir.

Q. And of diesel?

A. On diesel fuel, from the Standard Oil Company of New Jersey installation, two. None from outside suppliers' installations.

Q. Year 1934?

A. To December 10, 1934, 64 out of Standard Oil Company of New Jersey installations. None outside of suppliers' installations. On diesel fuel oil, nine from the Standard Oil Company of New Jersey installations. None from outside suppliers' installations.

Q. Subsequent to December 10, 1934, the same data appears in Taxpayer's Exhibit 27, does it not, that you previously put into evidence?

A. Yes, sir.

By Mr. Goodgold:

Q. Just a minute. The deliveries to which you just testified were made pursuant to the contracts offered by the Taxpayer and now as part of the records here, is that correct?

A. Yes, sir.

[fol. 295] Q. As far as you know, there were no limitations placed upon the Standard Oil Company with respect to the source from which they may ship any quantity of fuel oil?

Mr. Stockton: Objected to as being comprised within the contract terms.

Mr. Goodgold: Well, so is the evidence which you have submitted here, Mr. Counsellor, expressed in the documents submitted, and we have permitted you and your witnesses to elaborate on them.

Mr. Stockton: I withdraw the objection in view of that statement.

Q. Now, will you answer that question, please. My question is: Were there any limitations imposed on the Standard Oil Company with respect to the source of supplies, or source of supply, of fuel oil which the company shipped to the French Line during that period?

Mr. Stockton: If you know, of course.

The Witness: I would not be in a position to say so.

Q. You don't know whether there were any such limitations?

A. No, sir.

Q. As far as you know, there were none?

A. Well, I couldn't say. Because really I wasn't there, you see, at the time.

Q. The information you have just given us with respect to the number of deliveries made was merely based on the records showing the actual deliveries, is that correct?

A. Yes, sir.

Q. That was not based on any other evidences showing the source of supply from which the oil must have been shipped?

A. No, sir.

[fol. 296] Mr. Goodgold: All right.

Mr. Stockton: That's all, I think. You have no further questions?

Mr. Burke: No.

Mr. Stockton: I have no further witnesses.

(Witness excused.)

COLLOQUY

Mr. Stockton: I should like to come to an agreement if I can with Mr. Burke and Mr. Goodgold as to the marking in evidence of the Local Laws and the Comptroller's Regulations. I have here copies of the Local Laws which I understand to be applicable. That is, Local Law #20 of 1934, Local Law #24 of 1934, and with special reference to the stipulation entered into as to the personal property tax, Local Law #25 of 1934 and Local Law #13 of 1935. I should like to have those marked as exhibits with the understanding that where the court will take the laws handed up, we can do so, but if the court requires the laws to be printed in the record, then they can be printed in the record. These are the laws, Mr. Burke.

Mr. Burke: I have no objection, Mr. Stockton.

Mr. Stockton: All right. Then they can be marked and we can determine later in arrangements between counsel, whether they need to be printed or whether the court will take judicial notice of them. I call attention to the fact that the numbering is incorrect in this book.

(Discussion off the record.)

[fol. 297] (Received and marked Taxpayer's Exhibits as follows: Local Law No. 20 of 1934—36 in Evidence; Local

Law No. 24 of 1934—37 in Evidence; Local Law No. 25 of 1934—38 in Evidence; Local Law No. 13 of 1935—39 in Evidence.)

Mr. Goodgold: I understand that this concludes all the testimony that the Taxpayer desires to offer in these proceedings, is that correct?

Mr. Stockton: That is correct, yes. I will offer also the Sales Tax Regulations as Exhibit 41.

(Received and marked Taxpayer's Exhibit 41 in Evidence.)

I would like to put on the record a motion or objection at this time. The Taxpayer herein, Compagnie Generale Transatlantique, objects to the assessment of any tax by the City of New York in consequence or by virtue of the transactions under review in the present proceedings and asks that the Comptroller rule in this proceeding that no tax is payable on the ground that any such tax would violate Clause 3 of Section 8 of Article 1 of the Constitution of the United States and would constitute an unlawful invasion of the said Taxpayer's rights under said Clause, and would violate and constitute an unlawful invasion of the said Taxpayer's rights under the Fourteenth Amendment of the Constitution of the United States.

Mr. Goodgold: Well, these are all matters that have to be [fol. 298] determined from the evidence submitted and I can't rule on that motion.

Mr. Stockton: I am simply putting my objection on the record.

Mr. Goodgold: I will reserve my decision with respect to the evidence submitted and the motion which has been submitted.

Mr. Burke: Really, your motion is the Taxpayer's contention in this case, is it not, as a matter of law? It is a statement of the position upon which the Taxpayer relies.

Mr. Stockton: It is a statement of the Taxpayer to show that there is a Federal question involved. I will add to my statement of position the statement that such a tax would violate the section of the Constitution prohibiting a tax on exports—prohibiting any state from laying a tax on exports, and would constitute an unlawful invasion of the Taxpayer's rights under said clause of the Constitution.

Mr. Goodgold: Decision on the Taxpayer's amended motion is also reserved.

(Hearing is closed.)

Hearing closed: Decision Reserved.

[fol. 299] TAXPAYER'S EXHIBIT 1

Standard Oil Company of New Jersey,
Sales Department,
26 Broadway

Fuel Oil Division.
G. H. Michler.

New York, October 14, 1927.

Mr. O. R. Cauchois, Compagnie Generale Transatlantique,
19 State Street, New York, N. Y.

DEAR MR. CAUCHOIS:

This confirms our agreement to supply the total fuel oil requirements of your vessels

SS. Ile de France
Paris
France
De Grasse

at New York over the year 1928, maximum quantity 2,000,000 barrels "Standard" Bunker Fuel Oil, the price to be our market price date of delivery with guaranteed maximum price of $1.715 per barrel delivered by barge to your steamers.

Should we contract with any other steamship company for bunker supplies at New York over year 1928 at a price lower than the above, we will revise our above price to you to meet such low price.

This letter constitutes contract between us.

We beg to express our pleasure at renewing the very cordial and satisfactory business relations between our two companies over the coming year.

Yours very truly, G. H. Michler.

GHM.EB.

[fol. 300] TAXPAYER'S EXHIBIT 2

Cable Address: Transat, N. Y.
Telephone: Bowling Green 7500

French Line

Compagnie Generale Transatlantique, 19 State Street, New York

In Your Reply Refer to File No. —

October 14, 1927.

Standard Oil Company of New Jersey, Fuel Oil Division, 26 Broadway, New York, N. Y.

Attention to Mr. G. H. Michler

GENTLEMEN:

I have the pleasure to acknowledge receipt of your letter of the 14th. instant in regard to the contract between us for our requirements of fuel oil during the year 1928 for our steamers Ile de France, Paris, France and De Grasse, which is acceptable and hereby confirmed.

I am much pleased at this continuance of our cordial business relations for the coming year, which I am sure, as in the past, will be satisfactory for both parties.

Very truly yours, O. R. Cauchois, Advisory Director.

Address All Communications to French Line.

[fol. 301] TAXPAYER'S EXHIBIT 3

Standard Oil Company of New Jersey,

Sales Department,

26 Broadway

New York October 19, 1927.

Subject ——

Fuel Oil Division.
G. H. Michler.

Mr. O. R. Cauchois, Compagnie Generale Transatlantique, 19 State St., New York, N. Y.

DEAR MR. CAUCHOIS:

In line with agreement stated in second paragraph of our letter to you of October 14th., we hereby contract to supply the total fuel oil requirements of your vessels

SS. Ile de France
Paris
France
DeGrasse

at New York over the year 1928 maximum quantity 2,000,000 barrels "Standard" Bunker Fuel Oil, the price to be our market price date of delivery with guaranteed maximum price of $1.50 per barrel delivered by barge to your steamers.

This letter constitutes contract between us.

We beg to express our appreciation of renewing this most valued business with you on the above basis.

Yours very truly, G. H. Michler.

GHM.EB.

[fol. 302] TAXPAYER'S EXHIBIT 4

Cable Address: Transat, N. Y.
Telephone: Bowling Green 7500.

French Line,
Compagnie Generale Transatlantique,
19 State Street, New York

In your reply refer to File No. —

October 19, 1927.

The Standard Oil Company of New Jersey, Fuel Oil Division, New York, N. Y.

Attention Mr. G. H. Michler, Manager

GENTLEMEN:

I have the pleasure to acknowledge receipt of your letter of the 19th instant modifying our contract for the year 1928, maximum $1.50 per barrel delivered by barge to our steamers.

This letter constitutes an acceptation of the modification of the contract.

Appreciating highly the prompt manner in which you carried out the terms of your contract of October 14 in regard to our benefiting of the low price made by you, I have the pleasure to remain

Yours very truly, O. R. Cauchois, Advisory Director.

Address All Communications to French Line.

[fol. 303] TAXPAYER'S EXHIBIT 5

Standard Oil Company of New Jersey,
Sales Department,
26 Broadway

Fuel Oil Division.
H. G. Michler.

New York, November 9, 1927.

Subject——

Mr. O. R. Cauchois, Compagnie Generale Transatlantique, 19 State St., New York, N. Y.

DEAR MR. CAUCHOIS:

In line with agreement stated in second paragraph of our letter to you of October 14th we hereby revise contract

price at which we will supply the total fuel oil requirements of your vessels:

SS. Ile de France
Paris
Fr
De asse

at New York over the year 1928 maximum quantity 2,000,000 barrels "Standard" Bunker Fuel Oil to the following:

Our market price date of delivery with guaranteed maximum price of $1.40 per barrel delivered by barge to your steamers.

It is further understood that should our price at New York exceed by 15¢ per barrel the price quoted by other responsible competitive oil companies, your company, in the event of our failure to meet such competitive prices, will have the privilege of purchasing from other suppliers, the quantities so purchased to be deducted from the quantity which we are obliged to deliver under this contract.

This letter constitutes contract between us.

Yours very truly, G. H. Michler.

GHM:EB.

[fol. 304] TAXPAYER'S EXHIBIT 6

Cable Address: Transat, N. Y.
Telephone: Bowling Green 7500.

French Line,
Compagnie Generale Transatlantique,
19 State Street, New York
In Your Reply Refer to File No.—

November 9, 1927.

The Standard Oil Company of New Jersey, Fuel Oil Division, 26 Broadway, New York, N. Y.

Attention Mr. G. H. Michler, Manager

GENTLEMEN:

I beg to acknowledge receipt of your letter of the 9th instant modifying our contract for the year 1928, maximum

price of $1.40 per barrel delivered by barge to our steamers, and due note is taken of the clause relative to offerings on certain basis, that may be made to us by other companies.

This letter constitutes an acceptance of the contract.

Very truly yours, O. R. Cauchios, Acting General Representative.

Address All Communications to French Line.

[fol. 305] TAXPAYER'S EXHIBIT 7

Standard Oil Company of New Jersey,
Sales Department,
26 Broadway

New York January 5, 1928.

Fuel Oil Division
G. H. Michler.

Subject. ——

Compagnie Generale Transatlantique, 19 State St., New York, N. Y.

Attention Mr. O. R. Cauchois, Acting General Representative

DEAR SIR:

We hereby contract to supply the total fuel oil requirements of all your oil-burning vessels, including SS. Ile de France, Paris, France, De Grasse, and any other oil-burning steamers which you may place in operation during the period of this contract at New York from January 1st, 1929, to December 31, 1931, with "Standard" Bunker Fuel Oil; the price to be our market price date of delivery with guaranteed maximum price of $1.40 per barrel delivered by barge to your steamers at this port.

It is further understood that should our price at New York exceed by 15¢ per barrel the price quoted by responsible competitive oil companies your company, in the event of our failure to meet such competitive prices, shall have the privilege of purchasing from other suppliers the quan-

tity so purchased to be deducted from the quantity which we are obliged to deliver under this contract.

[fol. 306] This contract is in effect an extension on the same terms and conditions of our contract providing for supply of "Standard" Bunker Fuel Oil to your vessels at New York over year 1928 as finally amended by our contract letter to you of November 9, 1927, and your acceptance of same date.

This letter constitutes contract between us.

We beg to express our satisfacion at the continuance of the very cordial business relations between our two companies.

Yours very truly, Standard Oil Company of New Jersey, by G. H. Michler.

Accepted: Compagnie Generale Transatlantique, by O. R. Canchois.

GHM.EB.

(Here follows two photolithographs, side folios 307 and 308.)

TAXPAYERS EXHIBIT No. 8 (sheet 1)

STANDARD OIL COMPANY OF NEW JERSEY

SALES DEPARTMENT

[illegible]

[illegible], 1929.

Mr. O. R. Cambois,
Compagnie Generale Transatlantique,
19 State Street,
New York, N. Y.

Dear Mr. Cambois:

This will confirm our conversation last Friday, informing you that the Standard Oil Company of New Jersey is agreeable to extending your present contract, which expires on December 31, 1931, for a further period of five years [illegible] December 31, 1936, under the following terms and conditions:

The Standard Oil Co[illegible] to supply the total fuel oil requirements at New York of all the oil-burning vessels during the period of this contract, up to a minimum of 1,500,000 barrels per year, the price to be our open market price at New York in effect on date of delivery [illegible] $1.10 per barrel delivered, or under.

When the market price is $1.11 to $1.15 per barrel delivered, the price to remain $1.10; when the market price is $1.16 to $1.45 per barrel delivered, the price to be 5¢ per barrel less than the market price.

At all times when the market price is $1.45, or less, the usual competitive clause based on 10¢ per barrel below the market price is to apply; in other words, if at any time you have a bona fide offer from other suppliers of 10¢ per barrel or more, below the current market price, you are to advise the Standard Oil Company of New Jersey, who may elect whether or not they will meet the competitive price, and in the event of their failing to do so, you are to have the privilege of purchasing the oil so offered from others, in which event, the quantity of oil taken from other suppliers will be deducted from the total quantity the Standard Oil Company is obligated to deliver during that year.

When the market price exceeds $1.45 per barrel delivered, but does not exceed $1.55, you are to pay $1.45.

When the market exceeds $1.55, your price will be 10¢ less than the open market price up to a final maximum price of $1.55 per barrel delivered.

You are to notify the Standard Oil Company of New Jersey on October 1st. of each year estimated requirements of oil for

TAXPAYERS EXHIBIT No. 8 (sheet 8)

Mr. Bainbridge -2- 10/14/29

the following year.

If your requirements during any year exceed 3,000,000 barrels, the Standard Oil Co may buy, or may not, at their option, supply this additional quantity at the contract rate with the exception that the top price mentioned in the contract will not apply. In other words, if the open market price exceeds $1.00 per barrel, the Standard's billing price would be 15¢ under the open market price without any top.

All other terms and conditions of the contract to be identical with the terms and conditions of the present contract with the exception that the new contract does not provide for any oil at the fixed price of $1.00 per barrel.

Should we contract with other steamship companies for bunker supplies at New York over a similar period at a price lower than the above, we will revise our price to you to meet such lower price.

We shall be pleased to keep the above offer open for your acceptance until November 4th, and hope to have the pleasure of hearing favorably from you before that date.

Yours very truly,

W. W. Keller

EHM.MB

[fol. 309] TAXPAYER'S EXHIBIT 9

French Line,

Compagnie Generale Transatlantique,
19 State Street, New York

In Your Reply Refer to File No. —

Fuel Oil Division.

15th November, 1929.

The Standard Oil Company of New Jersey, 26 Broadway, New York.

Attention Mr. Mellar

Fuel Oil Contract

GENTLEMEN:

December 31st, 1931—December 31st, 1936

I wish to acknowledge receipt of your letter of October 14th submitting a proposition of the extension of our present contract, which expires on December 31st, 1931, for a period of five years, ending December 31st, 1936, under certain terms and conditions as set forth in the above mentioned letter.

By mutual agreement, the maximum number of barrels per year has been agreed to four millions.

I have the pleasure to state that I am authorized by my Company to accept your proposition, thereby concluding the contract, with the above modification, and I shall be pleased if you would send me acknowledgment on receipt of this acceptation, so that my file will be in order.

[fol. 310] It affords me great pleasure to be able to continue our friendly business relations for the further period and I beg to remain

Your very sincerely, O. R. Cauchois, Advisory Director.

P. S.—Under the conditions of your letter of October 14th your offer was opened until November 4th, but at my request you accorded a prolongation of the option up to November 20th.

O. R. C.

ORC: MP.

TAXPAYER'S EXHIBIT 10

Standard Oil Company of New Jersey,
Sales Department,
26 Broadway

Fuel Oil Division.
A. L. Mellar.

New York, November 19, 1929.

Subject: Fuel Oil Contract

Mr. O. R. Cauchois, Compagnie Generale Transatlantique,
19 State Street, New York, N. Y.

DEAR MR. CAUCHOIS:

We wish to acknowledge receipt of your letter of the 15th instant, from which we are very pleased to note that you [fol. 311] have accepted our offer to extend the Fuel Oil Contract which expires on December 31, 1931, for a further period of five years ending December 31, 1936, on the following terms and conditions:

Quantity:

The Standard Oil Company of New Jersey to supply the total fuel oil requirements at New York of all the oil-burning vessels of the Compagnie Generale Transatlantique during the period of this contract up to a maximum of 4,000,000 barrels per year.

The Compagnie Generale Transatlantique to notify the Standard Oil Company of New Jersey not later than October 1st of each year their estimated requirements for the ensuing year.

Price:

When the open market price at New York is $1.10 per barrel, or under, delivered, the Buyer is to pay the open market price.

When the open market price at New York is $1.11 to $1.15 per barrel delivered, the price is to remain $1.10.

When the open market price at New York is $1.16 to $1.45 per barrel delivered, the Buyer is to pay 5¢ per barrel less than the open market price. When the open market price at New York exceeds $1.45 per barrel delivered, but does not exceed $1.55, Buyer is to pay $1.40 per barrel.

[fol. 312] When the open market price at New York exceeds $1.55 per barrel delivered, Buyer's price will be 15¢ per barrel less than the open market price up to a final maximum price of $1.65 per barrel delivered.

In the event of any change in price, notice thereof shall be promptly given to the Compagnie Generale Transatlantique by mailing same to them at 19 State Street, New York, N. Y.

It is further understood that whenever the Standard Oil Company of New Jersey's open market price at New York exceeds by 10¢ per barrel the price quoted by other responsible competitive oil companies, the Compagnie Generale Transatlantique, in the event of the failure of the Standard Oil Company of New Jersey to meet such competitive quotations, will have the privilege of purchasing from other suppliers, the quantity so purchased to be deducted from the quantity which the Standard Oil Company of New Jersey is obliged to deliver under this contract. This competitive clause only to apply when the Standard Oil Company's open market price at New York is $1.45 per barrel or under.

If the Compagnie Generale Transatlantique's requirements during any year exceed 4,000,000 barrels, the Standard Oil Company of New Jersey may or may not, at their option, supply this additional quantity at the contract rate, with the exception that the top price mentioned in this contract will not apply; in other words, if the open market price exceeds $1.80 per barrel delivered, the Standard Oil [fols. 313-314] Company's billing price will be 15¢ per barrel under the open market price without any top.

All other terms and conditions of the contract to be identical with the terms and conditions of the present contract, with the exception that the new contract does not provide for any oil at the fixed price of $1.00 per barrel.

Should the Standard Oil Company of New Jersey contract with other steamship companies for bunker supplies at New York over a similar period at a price lower than the above, they will revise their price to the Compagnie Generale Transatlantique to meet such lower price.

We beg to express to you our pleasure in continuing the very cordial and satisfactory business relations between our two companies over this further period of years.

Yours very truly, A. L. Mellar.

ALM.EB.

(Here follows Taxpayer's Exhibit 11, photoprint, side folio 315)

[For the Convenience of Court and Counsel this Exhibit is Bound in on the opposite page.]

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TAXPAYERS EXHIBIT No. 11

STANDARD OIL COMPANY OF [illegible]

SALES DEPARTMENT

Fuel Oil Division

New York May 20, 1926.

FUEL OIL PRICES

Mr. O. R. Cambois,
Compagnie Generale Transatlantique,
17 State St.,
New York, N.Y.

Dear Sir:

Effective today the open market price at the Port of New York on "STANDARD" Diesel Fuel Oil has advanced 10¢ per barrel to 75¢ and on "STANDARD" Diesel Fuel Oil 80¢ per barrel to $1.80 per barrel, - both ex terminal, Bayonne, N.J.

Yours very truly,

A.L. MELLAR

FW.EB

Plus on Fuel Oil 5¢ $1.8
" " Diesel 6½ "

Note Increase

[fols. 316-317] TAXPAYER'S EXHIBIT 12

September 2, 1931.

Compagnie Generale Transatlantique, 19 State Street, New York City.

GENTLEMEN:

This will confirm our agreement to supply your entire "Standard" Diesel Fuel Oil requirements at the port of New York, N. Y. during period January 1, 1932 to December 31, 1933 on the basis of our current market price date of delivery with a guaranteed maximum price of $1.55 per barrel of 42 gallons at 60° F. ex terminal, or $1.16½ per barrel F. A. S. in minimum lots of 1500 barrels during the calendar year 1932 and a guaranteed maximum price of $1.70 per barrel ex terminal, or $1.76½ per barrel F. A. S. for the calendar year 1933. Our current market price of "Standard" Diesel Fuel Oil is $1.40 per barrel ex installation, or $1.46½ per barrel F. A. S.

For delivery of less than 1500 barrels we would charge you our terminal price date of delivery with maximums as specified above, plus minimum lighterage charge of $97.50.

In the event that it will be necessary for our tug boat to furnish steam for pumping there would be an additional charge of $15.00 per hour for such service.

We give you below guaranteed specifications of our "Standard" Diesel Fuel Oil:

A. P. I. Gravity	Min. 26 deg.
Flash Point (Abel or Pensky Martens closed cup)	Min. 150 deg. F.
Sulphur Content	Max. 1%

Adjustment in volume owing to difference in temperature [fol. 318] shall be made in accordance with Supplement to Circular No. 154, U. S. Bureau of Standards.

Our current market price of $1.40 per barrel ex terminal, or $1.46½ per barrel F. A. S. shall remain in effect until Seller gives Buyer written notice of any change. In the event of any change in price, notice thereof shall be promptly given by Seller by mailing same to Buyer at 19 State Street, New York City.

Should the Standard Oil Company of New Jersey contract with other Steamship Companies for "Standard" Diesel bunker supplies at New York over a similar period at a price

lower than above, they will revise their price to the Compagnie Generale Transatlantique to meet such lower price.

Yours very truly, Standard Oil Company of New Jersey, by A. L. Mellar.

Accepted: Compagnie Generale Transatlantique, by O. R. Cauchois.

JJS:MW.

[fols. 319-320] TAXPAYER'S EXHIBIT 13

Copy

Standard Oil Company of New Jersey,

Sales Department

26 Broadway

New York April 7, 1933.

File ALM

"Standard" Diesel Fuel Oil

New York, N. Y.

Compagnie Generale Transatlantique, 19 State Street, New York, N. Y.

GENTLEMEN:

Reference is made to our letter September 2nd, 1931; constituting contract between us providing for deliveries of "Standard" Diesel Fuel Oil to your vessels at the port of New York during period expiring December 31st, 1933.

It is agreeable to us that this contract be extended for an additional calendar year expiring December 31, 1934; the maximum prices to apply during the extended period to be $1.80 per barrel ex terminal, and $1.86½ for deliveries by barge, as provided. All other terms and conditions to remain unchanged.

Your indication of acceptance, provided for in the space below, will constitute an addendum to the contract.

Yours very truly, Standard Oil Company of New Jersey, by A. L. Mellar.

Accepted: Compagnie Generale Transatlantique, by O. R. Cauchois.

FWF:GE.
Aug. 23/33.

U. S. GOVT. 10-1-35—25,000-A

"STANDARD DIESEL FUEL OIL CONTRACT

AGREEMENT, made this 23rd day of January, 1935, between STANDARD OIL COMPANY OF NEW JERSEY, a Delaware corporation, hereinafter called SELLER, and COMPAGNIE GENERALE TRANSATLANTIQUE, 19 STATE ST., NEW YORK, N.Y. hereinafter called BUYER.

WITNESSETH: SELLER agrees to sell and deliver or arrange to have sold and delivered to BUYER by suppliers shown below and BUYER agrees to so purchase and receive and use as fuel for a period of TWELVE (12) months from January 1, 1935 to December 31, 1935 all fuel oil which BUYER shall require, in the ports hereinafter stated, up to but not exceeding FIFTEEN THOUSAND (15,000) barrels in any one month, and up to but not exceeding ONE HUNDRED THOUSAND (100,000) barrels during the said term of this contract, as fuel for the operation of the vessels hereinafter named while owned, operated, chartered or controlled by BUYER during said period, and for the operation of any other vessels which may be owned, operated, chartered or controlled by BUYER during said period; which said fuel oil to the quantity taken shall be used only in the operation of the vessel originally receiving it from SELLER.

This contract covers purchases in the following ports; supplier being shown opposite each:

New York, N. Y. - Standard Oil Company of New Jersey

The vessels now owned, operated, chartered or controlled by BUYER to which this contract applies are as follows:

Quality: Said fuel oil shall comply with the following specifications:

1. A. P. I. gravity—not less than 26°.
2. Sulphur content—not more than 1%.
3. Flash point, Abel or Pensky-Martens closed cup shall not be less than 150° F.

Delivery: Delivery of fuel oil hereunder shall be made by barge provided or caused to be provided by SELLER to BUYER'S vessel at dock within harbor limits at

New York, N.Y.

and/or to BUYER'S vessel alongside dock of SELLER or of selling and delivering company, at

New York, N.Y.

New York, N.Y.

and/or to BUYER'S vessel alongside dock of SELLER or of selling and delivering company, at

New York, N.Y.

Prices: The price or prices to be paid for said fuel oil per barrel of forty-two (42) bulk gallons (231 cubic inches) each shall be for each delivery hereunder delivering company's established selling price in effect at the time and place of delivery hereunder for fuel oil of the specifications herein named, delivered in similar amounts under the same conditions and to the same classification of customers, but such price, subject to the terms hereof, shall not exceed those shown below at the following ports:

Ports	Delivering Company's Dock	Delivered by Barge Provided or Caused to Be Provided by Seller
New York, N.Y.	$2.10	$2.165

Delivering company's established selling price on the date of this contract for fuel oil of the specifications herein named, delivered in the manner herein provided, is:

Ports	Delivering Company's Dock	Delivered by Barge Provided or Caused to Be Provided by Seller
New York, N.Y.	$1.89	$1.955

per barrel of forty-two (42) bulk gallons (231 cubic inches) each delivered. Such prices shall remain in effect until SELLER gives BUYER written notice of any change. In the event of any change in price, notice thereof shall be promptly given by SELLER by mailing same to BUYER at Pier #57, North River, New York, N.Y.

It is agreed that the printed provisions on the reverse side of this page be a part of this agreement.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year herein first above written.

STANDARD OIL COMPANY OF NEW JERSEY

By _____

COMPAGNIE GENERALE TRANSATLANTIQUE

By J. ARTUR

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TAXPAYERS EXHIBIT No. 14. (sheet 1.)

In accepting all deliveries hereunder BUYER shall render all necessary assistance and provide sufficient tankage and equipment to promptly receive all deliveries and in the event of barge delivery BUYER shall further provide steam required to effect delivery. Vessels or barges provided or caused to be provided by SELLER shall be given immediately clear and safe berth free of cost alongside BUYER'S fuel oil receiving lines. For delay to lighterage equipment provided or caused to be provided by SELLER in effecting deliveries hereunder BUYER agrees to pay demurrage at its established rates. BUYER shall give delivering company at the port of delivery at least forty-eight (48) hours' written notice of its requirements, such notice to stipulate the name of the ship, point of delivery, and quantity of fuel oil required. If BUYER receives less than ninety (90) per cent of fuel oil specified in the notice and tendered or caused to be tendered by SELLER, BUYER shall pay lighterage on ninety (90) per cent of the amount specified. The quantity of fuel oil delivered under this contract shall be determined from the official gauge of the barge effecting delivery and/or by ascertaining the quantity of fuel oil removed from the tank into the barge for such delivery. BUYER may be present or represented by properly accredited agent when such measurements are taken, but if BUYER is not present nor represented, then the delivering company's measurements and determinations of quantities shall be deemed to be correct. Inspection or sampling shall be done prior to fuel oil leaving delivering company's delivery container and no claim shall be made or allowed based on inspection of fuel oil subsequent to delivery.

If single barge deliveries of less than one thousand five hundred (1,500) barrels are made hereunder BUYER shall pay the delivering company's established lighterage rate at port of loading on the quantity delivered.

Adjustment in volume owing to difference in temperature shall be made in accordance with Supplement to Circular No. 154, U. S. Bureau of Standards.

It is agreed that any duty, tax or other charge now in effect or hereafter enacted which SELLER and/or other suppliers may be required to collect or pay with respect to the importation, manufacture, sale, delivery and/or use of the commodities covered hereby and/or to the importation and the transportation of the crude petroleum oil from which they are derived, to the extent the same may apply, may be added to the above prices at the option of the SELLER and/or of selling and delivering company and, if added, will be paid by the BUYER. If BUYER shall not desire to continue accepting deliveries under this contract on the basis of such increased price, BUYER may discontinue taking delivery of fuel oil hereunder after thirty (30) days' notice of such intention in writing to SELLER and cancel this contract upon payment of any unpaid account hereunder.

At the option of SELLER or delivering company, as the case may be, there may be added to the purchase price herein specified such charges as shall be levied, imposed or collected during the term of this contract by any foreign governmental or municipal authority by way of export duties, taxes, fees or other charges in addition to or in excess of those in effect on the date of this contract upon or with respect to the production, manufacture, transportation, sale and/or export of the fuel oil or any part thereof delivered or to be delivered under this contract and/or of the crude petroleum or any part thereof from which such fuel oil is or is to be derived. If BUYER, deeming such additional charges unacceptable, shall on that account desire to terminate acceptance of deliveries of fuel oil under this contract for the purposes herein specified, BUYER may in such case discontinue taking fuel oil hereunder after thirty (30) days' notice of such intention in writing to SELLER, and cancel this contract upon payment of any unpaid account hereunder.

Should BUYER make remittances for all sales and deliveries to BUYER pursuant hereto instead of making separate payments to each of the suppliers, BUYER shall in that event also remit to SELLER any duty, tax, fee, or other charge as aforesaid and SELLER shall assume the responsibility of remitting same to the respective companies making the sales and deliveries.

If BUYER should exercise said privileges of cancellation or either of them, BUYER, before purchasing any other fuel oil, shall advise SELLER of the price and other terms which are obtainable by BUYER and within ten days of the receipt of such advice SELLER may, at its option, elect to continue or arrange to have continued, deliveries of fuel oil to BUYER at said price and on said terms. Said option shall be exercised by notice given to BUYER by SELLER of its election to assume the sale and delivery of fuel oil at said price and under said terms. Thereupon BUYER agrees to make such purchases as are involved in the new arrangement.

If the National Industrial [illegible]

TAXPAYER EXHIBIT No. 14. (sheet 2.)

If the National Industrial Recovery Act, any code, regulation or interpretation thereof, or any future Governmental law, regulation or order, or the depreciation of the currency of the United States by the reduction in the gold content of the dollar, the issue of fiat money, inflation, expansion of credit, or otherwise, shall directly or indirectly increase the cost of the Seller in furnishing the products called for herein, or shall direct that such products shall be sold at minimum prices which shall be an increase over the prices provided herein, it is agreed that, upon thirty days' written notice by Seller to Buyer, the prices in this contract shall be revised from time to time to include such increase. Seller's statement of its increased costs and of their application in increasing prices hereunder shall be conclusive upon Buyer, but Buyer may cancel this contract as to any items affected by such costs at the end of such thirty-day period by giving to Seller at least fifteen days' advance written notice thereof. However, in no event shall the revised prices be more than Seller is willing to quote generally at the time of delivery on new business for the same products, quantities, territories, kinds of customers, and handling and delivery conditions as provided in this contract.

Payment shall be made by BUYER to the company making sale and delivery within thirty (30) days from the date of delivery in New York Exchange, United States Currency, with interest at six per cent (6%) thereafter.

It is understood and agreed that for the convenience of the parties hereto SELLER may accept from the other suppliers making sales and deliveries pursuant hereto memoranda of their sales and deliveries and SELLER bill BUYER for all fuel oil sold and delivered hereunder to BUYER during the preceding calendar month and BUYER make one payment to SELLER therefor, SELLER assuming the responsibility of remitting to each of said other delivering companies the portion of the BUYER'S remittances to which they are entitled.

Deliveries of fuel oil hereunder are made on the faith and credit of the vessel which uses the oil, and it is agreed that SELLER and/or delivering company will have and may assert a lien against such vessel for the amount of the purchase price of said fuel oil. Upon default by BUYER in making any payment for any fuel oil delivered hereunder, SELLER may cancel this agreement, or at its option, may thereafter refuse to make deliveries hereunder or cause deliveries hereunder to be refused except upon advance cash payment.

All orders shall be filled or caused to be filled with reasonable promptness, but neither SELLER nor delivering company nor BUYER shall be held responsible for any losses resulting if the fulfillment of any terms or provisions hereof shall be delayed or prevented by revolutions or other disorders, wars, acts of enemies, embargoes or other import restrictions, strikes, lockouts, fires, floods, acts of God, and arrest or restraint of princes, rulers or peoples, perils of the sea, accidents of navigation, breakdown or injury to ships, breakdown or injury to pipe lines, machinery or other facilities used for the production, transportation, receiving, manufacturing, handling or delivery of Crude Petroleum and/or Fuel Oil, expropriation or confiscation of the properties which constitute SELLER'S or delivering company's facilities for the production, transportation, receiving, manufacturing, handling or delivering of Fuel Oil and/or Crude Petroleum from which the same is derived or by any other acts not within the control of the party whose performance is interfered with and which by the exercise of reasonable diligence said party is unable to prevent.

If an embargo or restriction imposed by law against the import of Fuel Oil and/or Crude Petroleum shall curtail SELLER'S or delivering company's imports of Fuel Oil or Crude Oil, the obligation of SELLER or delivering company. as the case may be, hereunder during such curtailment shall at option of SELLER or delivering company, as the case may be, be reduced in the same proportion that imports of Fuel Oil and/or Crude Oil of SELLER or delivering company, as the case may be, shall be reduced.

This agreement shall not be assigned or transferred by BUYER directly or indirectly, without the written consent of SELLER.

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TAXPAYERS EXHIBIT No. 15

STANDARD OIL COMPANY OF NEW JERSEY

SALES DEPARTMENT

26 BROADWAY

FUEL OIL DIVISION
A.L.PRELLER

New York May 10, 1921.

FUEL OIL PRICES

Mr. O. R. Cambois,
Compagnie Generale Transatlantique,
17 State St.,
New York, N.Y.

Dear Sir:

Effective today the open market price at the Port of New York on "STANDARD" Bunker Fuel Oil has advanced 10¢ per barrel to 75¢ and on "STANDARD" Diesel Fuel Oil 20¢ per barrel to $1.80 per barrel, - both on terminal, Bayonne, N.J.

Yours very truly,

K.M.Gillett

Pay.22

Plus 5¢ for barging

Plus 6½ for barging

DEC 11 1934

ORDER NO. C 6514 WORKS Paris DATE

ACCOUNT Compagnie Generale Transatlantique

SHIP TO % Paris

715 Pier 57 NR

ROUTE 12/12 - 10 a.m. PIER

QUANTITY 4000 Tons 26 520 BBls PRODUCT

SHIP BONDED OIL

TAXPAYER EXHIBIT No. 16

STANDARD OIL COMPANY OF NEW JERSEY

OFFICE COPY

10/11/28

DAVIDSON

S/S PARIS

COMPAGNIE GENERALE TRANSATLANTIQUE-SSS
PIER 57 NORTH RIVER NEW YORK

S/S PARIS

N.J. PIER 57 NORTH RIVER

17

10/13

DAVIS

							10¢	11¢
	Signed Sig.S	666		DIESEL FUEL OIL				
				(74) SEC 27 1928 (176)	12/12-11- 14 881.36 Bbls 14-172- 10 225.32 "			
					DEC 14 1928			

SHIP TO MASTER OF

SHIPPING NOTICE AND O.K. TO

ADDRESS

ADDITIONAL O.K. TO

ADDRESS

MAIL CHARGES

DESTINATION TO MASTER

DESTINATION TO TUG

SPECIAL INSTRUCTIONS BY TUG

STANDARD FORM NO. 17

245

TAXPAYERS EXHIBIT No. 18

Form STM 30

STANDARD-VACUUM TRANSPORTATION COMPANY

LIGHTER ORDER U6504

New York, 12/11 193

Have Lighter at _____ By _____ M.

To Load: 26520 Bbls STANDARD Bunker Fuel Oil, SHIP BONDED OIL

For Delivery to: 36 Paris 73 River ✓ NK

Delivery Date: 12/12 - 10 a.m. - 2 By Wallabout

Charge to: Tom J

Gus

16504
17/11

MEMO FOR MR. GEO. JONES EXPORT DEPT. DATE

WE HAVE ORDERS TO DELIVER 26520 BBLS BONDED FUEL OIL

TO THE FOLLOWING VESSEL.

VESSEL Paris

LOCATION 75 Pier 57 NR

TIME OF DELIVERY 12/12 - 10 a m

STEAMER CLEARING FOR France

OFFICIAL NO.

SIGNAL LETTERS

GROSS TONNAGE

KINDLY MAKE CUSTOM HOUSE ENTRY.

French

27000
42
54
108
1134000

FUEL OIL DEPT.

PER D.J.WILLIS

2 25 DEC 11 1934

TAXPAYERS EXHIBIT No. 19

247

328

TAXPAYER'S EXHIBIT No. 20

DATE DEC 12 1934

SHIP BONDED OIL

SHIP BONDED OIL

SHIP BONDED OIL

BARGE LOADINGS — STANDARD FUEL OIL

DATE Dec. 17 '45 1945 REV. Revised

24

DATE LOADED	NAME	IN PLACE WHERE LOADED	LOADED FROM SHORE TANKS	TOTAL IN BARGE	DELIVERIES					TOTAL DELIVERED
14	[illegible] 9		✓ 334 88							1716-726 91
4	[illegible] 17		✓ 84 15							"
5	[illegible] 22		✓ 36 97							"
	29		1393 88		Eagle 260					
					1.96'66					1710-715-91
	177		11378 [illegible]		[illegible]					1610-726 66
	99		954 87		Alaska					172-165 91
	41		4764 00		Bremen					161-726 65
	48		4138 19		Bremen					"
	77	Prod. 1938 74								
15	[illegible] 26 Bergland		215 61							126-200 191
15	[illegible] 26 Stranger	✓	299 61		U6621					172-165 91
	[illegible] 1917	✓	522 09		U6652					163-175-74
	46 Pinney	✓	524 49		U6556					172-165 91
15	Pinney	✓	3617 98		U6563					1610-726-65

RADIATION LABORATORY No. 82

889

249

BARGE LOADINGS—STANDARD FUEL OIL

DATE Oct. 27th 1924 REPT. Bayonne

23

DELIVERIES

BARGE NUMBER	GRADE	AS SHOWN ON SHORE LOADING	GROSS BARGE TONS	TOTAL AS SHORE						TOTAL DELIVERIES
12 11										173-209-142
		✓	1723	35	V6517					172-230-186
		✓	2141	78	V6488					46-230-64
		✓	96	32	V6510					173-230-32
		✓	41	32	V6511					
		✓	311	28						173-209-142
		✓	32	29						
		✓	22	16						
		✓	172	84						
					HK Steel					
	70		803	21	515 BS					111-230-64
					Haiti					
	59		2081	89	2102 TK					
					Nana					
	11		14678	26	14881 BC					15-230-66

SAYBOLT SHEET No. 88

250

251

TAXPAYERS EXHIBIT No. 88

Standard Oil Company of New Jersey

FUEL OIL RECEIPT

No. 11

Paris

Bin 57 N. R. 12/12/49 7 1/2 B 7 1/2 Q.

						5	10-6	16	1064.42	5	10-4	16	1063.56
						13	7-3	16	1393	13	1-4	16	13.81
8						8	6-5	16	861.57	8	5-7	16	861.57
						14	5-3	16	13.37	13	10-0	16	86.41
8						8	7-5	16	1149.44	8	7-5	16	1149.44
						13	5-3	16	1.49	13	1-4	16	2.40
4						4	6-5	16	1013.72	4	6-5	16	1013.72
						13	7-4	16	17.40	13	7-3	16	6.21
8						8	6-0	16	1076.45	7	10-5	16	1064.83
						13	5-3	16	15.41	13	1-3	16	3.61
8						8	7-3	16	1160.49	8	5-7	16	1162.49
						14	0-3	16	24.09	13	11-3	16	19.16
7													

Sp. Gr. 9.57	
Vol. 6	
Flash 230	
Signature	

TOTAL GROSS BBLS. 15097.74
TONS 2263.40
TOTAL NET BBLS. 14221.24

T. Shipley
O. Watkins

232

332

TAXPAYERS EXHIBIT No. 96 A

Standard Oil Company of New Jersey

FUEL OIL RECEIPT

Falls

L. 37 R

12/14 9A 6P 123.6

No.	Name	Starboard Tanks Feet	Inches	Tons	Gross Barrels	Port Feet	Inches	Tons	Gross Barrels	Starboard Feet	Inches	Tons	Gross Barrels
1													
2						3	3-0	100	1373 40	3	0	2	101 1608 91
						15	4 6	10	36 93	15	4	2	10 36 07
3						3	3-2	101	1372 96	3	0	10	1379 11
						15	4-4	10	37.59	15	4-6	10	37.65
4						3	2-9	101	1354 57	3	1-0	10	1581 6
						15	6 .	10	1766	15	4 4	10	36 69
5													
6						3	3-0	10	1111 43	3	1-4	10	1165 14
						1	4-1	10	679 22	1	5 4	10	6941
7													

Gr. Wt. 9906

Tare 62

Fuel 230

Received 1035 Barrels Fuel Oil from the Barge Falls to the Steamer Lackawanna

Per L. Thurlow Co.

Total Gross Bbls. 10390 55

Tare

Total Net Bbls. 10323 11

Thurlow Co.
Per L. Lindsay

333

TAXPAYER EXHIBIT No. 84 B

Standard Oil Company of New Jersey

FUEL OIL RECEIPT

No. 122

Paul's Hall Boat

12/15 3rd 9 40 AM 9 50 AM

		CHARGE TANK				PUMP				STRAIGHTAWAY			
		FEET	INCHES	TENTHS	GALLONS	FEET	INCHES	TENTHS	GALLONS	FEET	INCHES	TENTHS	GALLONS
1													
2													
3													
4													
5													
6													
7													
8													
9													
10													

4916 Hayden

62 24 Hours 12/14 3rd

330

TOTAL GROSS SALE 1331 64

DUTY

TOTAL NET SALE 1331 36

W M Perry

Geo Lindsay

334

TAXPAYERS EXHIBIT No. 29

26 BROADWAY
NEW YORK

J. W. CONNOLLY

TAXPAYERS EXHIBIT # 29 IN EVIDENCE
Jan. 31, 1931

December 14, 1926.

File JWC
SS PARIS

Mr. T.A. Wolfe, Marine Supt.,
French Line,
Pier 57, North River,
New York, N.Y.

Dear Sir:

We give below tests of the "Standard" Bunker Fuel Oil we delivered to the above ship at New York:

Date	Dec. 13	Dec. 14
Barge	11	122.
Refinery	Bayonne	
Origin	Mixed	
Specific Gravity	.9624	.9659
A.P.I. Gravity	15.5°	15°
Flash Point (Closed Cup)	230°F.	230°F.
Viscosity @ 122°F. (Saybolt Furol)	65 sec.	65 sec.
B.T.Us.	18640	18620
Sulphur Content	2.3%	2.3%
Moisture	.1%	.3%

Yours very truly,

STANDARD OIL COMPANY OF NEW JERSEY

By J. W. CONNOLLY

DJW:GE
In trip.

335

TAXPAYERS EXHIBIT No. 26 A

781

STANDARD OIL COMPANY OF NEW JERSEY

53 Room 2320-26 Broadway
SS. PARIS 54 New York City

PLEASE NOTE ADDRESS TO WHICH REMITTANCE SHOULD BE SENT

Compagnie Generale Transatlantique
Pier 57, North River,
New York City.

DATE Dec.18,1918

Bayonne 61-12174

BARGE 911

13/12

Bunker Fuel Oil	14 881.86 bbls 42's	$1.05 bbl. F.O.B. Refy	$ 15 625.95
	Lighterage	.05 bbl.	744.09
			$ 16 370.04

TAXPAYERS EXHIBIT # 26 IN EVIDENCE
June 21 '27

Delivered to - SS PARIS, 88 Pier 57, North River - 12/18/18

TAXPAYERS EXHIBIT No. 26 B

MAKE ALL REMITTANCES TO EXACT NAME AS PRESENTED PLEASE NOTE YOUR ORDER NO. ON SHIPMENT

STANDARD OIL COMPANY OF NEW JERSEY

53 ROOMS 2900-26 BROADWAY

SS. PARIS 57 NEW YORK CITY

PLEASE NOTE ADDRESS TO WHICH REMITTANCE SHOULD BE SENT

Compagnie Generale Transatlantique,
Pier 57, North River,
New York City.

DATE Dec. 14, 19[illegible]

ORDER NO. B-6904

SHIP Bayonne VOYAGE 91-12175

VIA BARGE #122 TERMS

Bunker Fuel Oil	10 285.33 bbls 42's	$1.05 bbl. F.O.B Refy	$10 796.60
	Lighterage	.05 bbl.	511.27
			$11,307.87

TAX June 1, 37 208

Delivered to - SS PARIS, NS Pier 57, North River - 12/14/36

[fol. 337]

TAXPAYER'S EXHIBIT 27

French Line Deliveries

December 1934 and Year of 1935

Total Number of Deliveries—105

Number Deliveries out of Shell (Bayonne, N. J.)—1
" " " " Gulf (Gulfport, S. I.)—2
" " " " Mex. Pet. (Carteret, N. J.)—2

Bunker "C" Fuel Oil

Date	Order	Vessel	Barge	Refinery	Quantity (bbls. 42's)
1934					
Dec. 12	U6504	Paris	11	Bayonne	14,881.86
14	6504	"	122	"	10,225.33
26	6724	Ile de France	57	"	17,837.62
28	6724	"	4	"	3,039.39
28	6724	"	58	"	15,169.41
1935					
Jan. 11	106	Champlain	4	"	6,341.34
11	106	"	59	"	2,399.86
16	178	Ile de France	58	"	17,292.17
17	178	"	57	"	17,337.48
25	368	Lafayette	48	"	1,763.86
31	488	Champlain	72	"	2,881.38
Feb. 7	684	Ile de France	122	"	12,312.63
8	684	"	124	"	8,260.53
21	965	Champlain	48	"	2,702.36
28	1110	Ile de France	58	"	17,132.09
28	1110	"	124	"	3,829.53
Mar. 7	1256	Paris	11	"	12,932.87
7	1255	Lafayette	59	"	1,591.59
14	1430	Champlain	48	"	2,735.40
20	1558	Ile de France	58	"	17,240.48
20	1558	"	57	"	6,570.04
28	1702	Paris	123	"	11,942.19
Apr. 4	1859	Champlain	48	"	2,619.72
[fol. 338]					
10	1968	Ile de France	58	"	17,221.05
10	1968	"	123	"	6,935.47
17	2097	Paris	57	"	10,164.01
May 2	2404	Champlain	124	"	1,936.28
10	2558	Paris	122	"	11,342.25
16	2675	Ile de France	124	"	8,767.15
16	2675	"	11	"	14,817.67
26	2837	Champlain	99	"	2,607.78
31	2966	Lafayette	72	"	1,671.14
June 4	3009	Normandie	57	"	16,743.76
4	3009	"	58	"	17,236.15
4	3009	"	48	"	5,970.34
13	3178	Champlain	99	"	2,662.96
21	3333	Normandie	57	"	15,074.28
21	3333	"	58	"	17,346.69
26	3470	Ile de France	11	"	15,239.76
27	3470A	"	124	"	11,602.90
July 3	3602	Champlain	57	"	9,017.44
9	3681	Normandie	57	"	17,763.26
9	3681	"	58	"	17,337.31
9	3681	"	48	"	3,240.28
19	3891	Ile de France	57	"	16,911.17
19	3891	"	58	"	17,251.10
25	4005	Champlain	124	"	12,551.62
25	4005	"	72	"	4,086.21

Date	Order	Vessel	Barge	Refinery	Quantity (bbls. 42's)
1935					
July 30	4096	Normandie	57	Mex. Pet. (Carteret, N. J.)	14,443.70
30	4096	"	58	"	16,874.15
Aug. 7	4290	Ile de France	57	Bayonne	17,764.00
8	4290	"	11	"	13,456.53
16	4413	Champlain	57	"	14,651.66
20	4498	Normandie	57	"	16,698.36
20	4498	"	58	"	15,632.52
28	4672	Ile de France	58	"	17,442.72
30	4672	"	11	"	15,512.74
31	4715	Champlain	58	Shell (Bayonne, N. J.)	6,708.34
[fol. 339]					
Sept. 3	4733	Normandie	48	Bayonne	4,247.42
3	4733	"	57	"	17,740.18
3	4733	"	58	"	15,483.64
4	4770	Champlain	57	"	15,133.80
13	4935	Lafayette	99	"	1,520.86
18	5025	Il de France	122	"	13,066.86
18	5025	"	11	"	15,051.37
19	5025	"	58	"	6,779.58
24	5096	Normandie	11	"	15,160.54
24	5096	"	60	"	2,356.54
24	5096	"	58	"	17,392.53
25	5096	"	59	"	1,608.91
25	5126	Champlain	105	Gulf (Gulfport, S. I.)	3,145.71
24	5126	"	124	"	13,122.79
Oct. 8	5376	Normandie	72	Bayway	4,741.56
8	5376	"	11	"	15,124.55
8	5376	"	123	"	12,744.89
16	5556	Ile de France	58	"	17,517.91
17	5556	"	58	"	17,214.84
22	5641	Normandie	58	"	17,413.19
22	5641	"	4	"	4,324.51
22	5641	"	123	Bayonne	12,685.46
Nov. 7	5938	Champlain	123	"	9,719.44
13	6026	Ile de France	58	Bayway	3,815.24
13	6026	"	123	"	12,608.88
13	6026	"	99	Bayonne	2,309.41
27	6286	Champlain	48	"	3,650.07
Dec. 5	6423	Ile de France	58	"	17,373.24
6	6423	"	123	"	8,631.70
18	6636	Champlain	48	"	5,623.85
23	6747	Ile de France	124	"	12,999.09
24	6747	"	333	"	8,048.82
24	6747	"	48	"	5,101.22
		Diesel Fuel Oil			
1934					
Dec. 21	G1736	Lafayette	72	Bayonne	5,045.83
[fol. 340]					
1935					
Jan. 3	69	"	72	"	4,973.41
26	123	"	72	"	4,681.82
Feb. 14	235	"	75	"	4,724.51
Mar. 8	344	"	98	"	1,880.96
28	451	"	104	"	2,163.82
Apr. 17	559	"	104	"	3,882.15
May 31	761	"	104	"	4,785.67
June 19	870	"	18	"	4,739.99
Aug. 21	1107	Asta	104	"	758.20
23	1108	Lafayette	78	"	443.12
23	1108	"	104	"	5,325.48
Nov. 22	1579	"	104	"	4,948.94
Dec. 13	1698	"	104	"	1,855.60

STANDARD OIL COMPANY OF NEW JERSEY

OFFICE COPY

DATE 8/31/58

VESSEL Shell

CHARTER 88 CHAMPLAIN
COMPAGNIE GENERALE TRANSATLANTIQUE-AGT
610-5TH AVE NYC ITY

ADDRESS

ORDER U 4715

CUSTOMER NO.

SHIP TO 88 CHAMPLAIN

TAXPAYERS EXHIBIT 6 FOR IDENTIFICATION EVIDENCE
June 21, 1957 RKH

SALE NO.

DESTINATION 88 PIER 57 NR

TERMS

LOADING PORT

PERMIT

SHIPPED DATE 8/31-1PM

BARGE

QUANTITY	GRADE	GRADE OR PRODUCT	BRAND	MARKS AND NUMBERS			
					65°		
6700 BBLS	2668		STD BUNKER FUEL OIL	Less Voluntary Allowance 5"		Per Std.	
				8/31-58 - 19.834 bbls			
		SHIP BONDED OIL			NEW JERSEY STATE TAX EXEMPT		

SHIP IN NAME OF

SHIPPED NOTICE AND BAL TO

ADDRESS

ADDITIONAL BAL TO

ADDRESS

INSP. CHARGES

RETENTION TO GRADE

RETENTION TO TUG

STEAM FURNISHED BY TUG

RECEIVED ATTACHED SEP 5 1958

TERMS

5

TAXPAYERS EXHIBIT No. 88 A

259

TAXPAYERS EXHIBIT No. 28 B

ORDER No. 1/471.5 WORKS Bklyn DATE

ACCOUNT Empire Gasoline Steamship Co

SHIP TO S/S Champlain

S/S Pier 57 NR

9/21 - 1 PM

ROUTE PIER

QUANTITY 1600 Tons 67.6886 PRODUCT STANDARD Bunker Fuel Oil

SHIP BONDED OIL

AUC : 936

TAXPAYERS EXHIBIT 28 IN EVIDENCE

343

TAXPAYERS EXHIBIT No. 28 C

SOCONY-VACUUM OIL COMPANY, INC.
MARINE TRANSPORTATION DEPARTMENT

LIGHTER ORDER 04714

New York, 8/29 1933

Have Lighter at _____ By _____ M.

To Load { 670 BBls ~~"STANDARD" Bunker Fuel Oil~~ SHIP BONDED OIL
Vessel arrives Pier Hoboken 6 P.M.

For Delivery to F. Hamilton 55 Pier 7 N.R.
Delivery Date 8/31 1 P.M.
Charge to 7078

262

344

TAXPAYERS EXHIBIT No. 86 D

Standard Oil Company of New Jersey 58

FUEL OIL RECEIPT

s/s Champlain 12 p 12 p

Pier 57 N.R. 3/31-35 12 p 4 30 p

Tank No.	Grade	Gauge Feet	Gauge Inches	Gauge Quarters	Gauge Barrels	Feet	Inches	Quarters	Barrels	Feet	Inches	Quarters	Barrels
1													
2						S 8	9.1	10	257.30	S 8	5.3	10	199.20
						SS 8	9.1	10	1.34	SS 8	5.1	10	1.27
3						S 8	9.1	10	362.10	S 8	5.1	10	362.10
						SS 8	10.6	10	1.53	SS 8	10.6	10	1.35
4													
5													
6						S 8	9.1	10	257.30	S 8	5.3	10	199.20
						SS 8	9.1	10	11.73	SS 8	9.1	10	9.05
7													

Sp. Gr. 9765

Vis. 220

Flash 206

Remarks

TAXPAYER'S EXHIBIT A [illegible]

June 21, 1937

Total Gross Bbls. 8740.14

Met. Tons 1037.21

Total Net Bbls. 8701.34

C. Olsen

Master

345

TAXPAYERS EXHIBIT No. 28 E

Standard Oil Company of New Jersey 58

FUEL OIL RECEIPT

S.S. Champlain 12 A.M. 12 P.M.

Pier 57 N.R. 7/31-35 1 P.M. 4 30 P.M.

Tank No.	Grade	Gauge Tenths	Gauge Inches	Gauge Quarters	Gauge Barrels	Feet	Inches	Quarters	Gauge Barrels	Feet	Inches	Quarters	Gauge Barrels
1													
2						3	5.1	1/0	1447.585	3	5.3	1/0	1447.810
						33	5.7	1/0	1.498	33	6.7	1/0	1.524
3						1/3	5.1	1/0	362.145	1/3	5.1	1/0	362.145
						33	10.6	1/0	1.343	33	10.6	1/0	1.343
4													
5													
6						3	4.7	1/0	1317.498	3	5.3	1/0	1317.810
						33	7.1	1/0	11.373	33	8.1	1/0	1.416
7													

Sp. Gr. 9765

Temp. 88°

Flash 206

Moisture

Total Gross Bbls. 6743.147

Met. Tons 1037.23

Total Net Bbls. 6701.34

E. Olsen

June 21 37

STANDARD OIL COMPANY OF NEW JERSEY

OFFICE COPY

DATE 7/30/57

VESSEL Mary Carl

CHARGE 88 NORMANDIE
COMPTOIR GENERALE TRANSATLANTIQUE
610-5TH AVE NYCITY

ORDER U 4096

CUSTOMER NO.

ADDRESS

SALE NO.

SHIP TO 88 NORMANDIE

RELEASE PUMP

DESTINATION 88 PIER AA HR

TERMS

ROUTE BA-SC

PURCHASE

SHIPPED DATE 7/30-8AM

QUANTITY	GRADE	GRADE OR PRODUCT	BRAND	GROSS AND NET GALLONS	PRICE PER GAL.	PRICE PER BBL.	TOTAL AMOUNT
35500 GALS	2668	SHIP BUNKER FUEL OIL	STD BUNKER FUEL OIL	Less Voluntary Allowance 5% / Per Bbl. NEW JERSEY STATE TAX EXEMPT 7/30-57- 11443.30 BBLS 30-58- 16874.15	$1.65	$1.70	

SHIP ON BOARD OIL

AUG 1 1957

SHIP ON BOARD OF

SHIPPED BEFORE AND BILL TO

ADDRESS

ADDITIONAL BILL TO

ADDRESS

LABEL CHARGES

DESTINATION TO CHANGE

DESTINATION TO YOU

SPECIAL INSTRUCTIONS BY YOU

TRUCK NUMBER 6

FILE

264

TAXPAYER'S EXHIBIT "A" IN EVIDENCE

946

ORDER NO. 11116 WORKS Bayonne DATE 12/27/37 7/27

ACCOUNT Compagnie Generale Transatlantique

SHIP TO S/S Normandie

NS Pier 88 NR

ROUTE 7:30 - 7 a m FRT

QUANTITY ~~40,000~~ 32500 BBls PRODUCT ~~"STANDARD" Bunker Fuel Oil~~

~~4400~~ Tons,

* SHIP BONDED OIL

TAXPAYERS EXHIBIT No. 29 B

347

348

TAXPAYERS EXHIBIT No. 29 C

TAXPAYERS EXHIBIT # 9C Identified 11/8/37

SOCONY-VACUUM OIL COMPANY, INC.
MARINE TRANSPORTATION DEPARTMENT

LIGHTER ORDER

New York, 7/27 1935

Have Lighter at Coe Hook By 1 P.M.

To Load
- 3250 BBL "STANDARD" Bunker Fuel Oil
- SHIP BONDED OIL

For Delivery to SS Normandie 108 Pier 88 NR

Delivery Date 7/30 7 AM

Charge to Time

10/25/37 - 7/37

PLEASE SUPPLY MR. GEO. JONES REPORT NUMBER 34.500 DATE _____

WE HAVE ORDERS TO DELIVER _____ TONS BUNKER FUEL OIL

TO THE FOLLOWING VESSEL: SS Normandie

VESSEL _____

REGISTER NS Fr SS NR

PORT OF DELIVERY 1/30 - June

STEAMER CLEARING FOR France French

OFFICIAL NO. _____

SIGNAL LETTERS _____

GROSS TONNAGE _____

KINDLY HAVE CHECK HOUSE REPORT.

325
62
650
1300
1,36.5,000

11.00
GWD

FUEL OIL DEPT.
PER D.J.WILLIS

TAXPAYERS EXHIBIT No. 89 D

349

267

350

TAXPAYERS EXHIBIT No. 29 E

Standard Oil Company of New Jersey

FUEL OIL RECEIPT

S/S Normandie — Pier 88 N.R. — 7-30-33

TANK NO.	GRADE OF OIL	SHORE TANK FEET	SHORE TANK INCHES	SHORE TANK TENTHS	SHORE TANK GROSS GALLONS	POINT FEET	POINT INCHES	POINT TENTHS	POINT GROSS GALLONS	STARBOARD FEET	STARBOARD INCHES	STARBOARD TENTHS	STARBOARD GROSS GALLONS
1						1	10.0	94	146463	1	10.1	94	160433
						24	9.3	94	8.73	24	9.4	94	8.73
2						1	7.1	94	124951	1	6.7	94	124497
						23	9.4	94	1.04	23	9.3	94	1.04
3						2	2.0	94	150523	2	2.2	94	150524
						23	2.0	94	2.42	23	2.3	94	1.66
4						1	5.3	94	98.4198	1	6.0	94	98.4296
						23	10.3	94	1.32	23	10.4	94	3.66
5						1	5.4	94	146411	1	6.0	94	146369
						18	7.0	94	33648.5	18	10.2	94	33676
6						1	7.3	94	39.2655	1	7.6	94	39.2676
						1	9.3	94	1.23.61	1	9.6	94	1.23.71
7													

DP. 28.2 6.7

VIS 14.4 3.10

PLANE 94.7

SOUNDING 14.4 3.10

SUPPLIER 7.49%

TOTAL GROSS BBLS 14641.265

M. TONS Factor 2267.83

TOTAL NET BBLS

E.J. Dunnigan

— 351

TAXPAYERS EXHIBIT No. 89 F

TAXPAYERS EXHIBIT

Standard Oil Company of New Jersey

FUEL OIL RECEIPT

Hornander

P 88 NR 7/30/51 Jno 1 5,130

1															
2															
3															
4															
5															
6															
7															

11194.275

TOTAL GROSS BBLS. IN METRIC TONS 2649.25

TOTAL NET BBLS. 1697.12

Pittsburgh

B. C. Gibson

270

352

TAXPAYERS EXHIBIT No. 89 G

Standard Oil Company of New Jersey

FUEL OIL RECEIPT

Tel. from

c/o Normandie

E. Hook 7/31/35

Vessel

Left from Normandie 7/31/35

Landed on Tk 8 Hook 7/31/35

STANDARD OIL COMPANY OF NEW JERSEY

OFFICE COPY

U 5186

17040 GRD

STD BUNKER FUEL OIL

Less Voluntary Allowance 5

9/4 - NW - 13.166.71 Bbls

9/5 - 10S - 3145.71 Bbls

R.

NEW JERSEY STATE TAX EXEMPT

SEP 27 1939

TAXPAYERS EXHIBIT A-328 IN EVIDENCE

6/20/51 JP

TAXPAYER'S EXHIBIT No. 30 A

353

271

Tonge 9:1.04

ORDER NO. 5121 WORKS Rouses Point DATE 9/3.

ACCOUNT Compagnie Generale transatlantique

SHIP TO S/S Champlain

Pier 57 South Side Canal Basin

ROUTE 9/4 7AM FRT.

QUANTITY 4 boxtons 11x7 bbls PRODUCT "STANDARD" Bunker Fuel Oil

L66B

SHIP BORDED OIL

(5)

PLAINTIFF'S EXHIBIT No. 80 B

252

54

355

TAXPAYERS EXHIBIT No. 30 C

TAXPAYERS EXHIBIT # [illegible] IN EVIDENCE

SOCONY-VACUUM OIL COMPANY, INC.
MARINE TRANSPORTATION DEPARTMENT

LIGHTER ORDER

New York, 9/23 1931

Have Lighter at Buoy By

To Load 1771 Bbls "STANDARD" Bunker Fuel Oil
SHIP BONDED OIL

For Delivery to S/S Kungsholm 55 Pier 57 North River

Delivery Date 9/24 9 AM

Charge to Fuel Oil

356

TAXPAYERS EXHIBIT No. 80 D

Standard Oil Company of New Jersey No. 184

FUEL OIL RECEIPT

M/T Champlain Voyage No. 3405

From Ras Gharib To Bombay Date 9/24/25 Sailed From 3 30 P Arrived 11 15 A

Tank No.	Grade	Double Tank: Ullage	Temp	Gross Barrels	Port: Ullage	Temp	Gross Barrels	Starboard: Ullage	Temp	Gross Barrels
1					3 4½	102	1041.47			
					21 1-7	102	18.73			
2					4 11-0	102	875.60			
					20 4-0	102	446.64			
3					2 6-0	102	308.47			
					19 9-0	102	10.93			
4					3 3-4	102	871.96			
					19 6-2	11.	9.45			
5					3 3-2	102	753.11			
					19 4-3	102	9.23			
6					4 6-5	102	1367.94			
					19 4-0	102	16.36			
7					3 4-2	102	1253.45			
					19 9-3	102	1.94			

Sp. Gr. 9652

Tons 136

Tubes 170

Signature

Remarks

TOTAL GROSS BBLS 1337.57

METRIC TONS 2009 KG

TOTAL NET BBLS 1212.79

C O'Neill

Master

1st Lt. Engineer

357

TAXPAYERS EXHIBIT No. 30 E

TAXPAYERS EXHIBIT No. 30 E IN EVIDENCE 6/

Standard Oil Company of New Jersey

FUEL OIL RECEIPT

CARGO NO. 185

c/o Champlain — RECEIVED SEPTEMBER 10th 9/29/35 — P.M. — RELEASED 10:05 — M.

VESSEL Pine 57 M.R. DATE 9/25/35 START PUMP 2:10 P.M. FINISH 4:25 P.M.

TANK NO.	GRADE	GAUGE FEET	GAUGE INCHES	GAUGE TEMP.	GAUGE GALLONS	POINT FEET	POINT INCHES	POINT TEMP.	POINT GALLONS	STRAPPED FEET	STRAPPED INCHES	STRAPPED TEMP.	STRAPPED GALLONS
1						4	4.2	100	959.77				
						13	9.7	100	3.60				
2						2	4.6	100	1259.33				
						13	9.8	100	10.76				
3													
4						4	3.1	100	1053.21				
						13	7.4	100	124.42				
5						2	5.2	100	1137.19				
						2	5.2	100	1137.19				
6													
7													

API GR. 15.1

REMARKS

VIS. 156 @ 122°

FLASH 170

MOISTURE

TOTAL GROSS BBLS. 3196.53

METRIC Tables 497.63

TOTAL NET BBLS. 3141.71

Jerry

E.Y. Gilbert

356

TAXPAYERS EXHIBIT No. 30 F

Standard Oil Company of New Jersey

FUEL OIL RECEIPT

DUPLICATE

LARGE NO. 105

From Gulf Ref Co

Gulfport Miss. DATE 9/25/35 STARTED PUMP 10 P.M. FINISH 1.30 A.M.

TANK NO.	NAME	STARBOARD FEET	STARBOARD INCHES	STARBOARD TEMP	STARBOARD GROSS BARRELS	PORT FEET	PORT INCHES	PORT TEMP	PORT GROSS BARRELS	STARBOARD FEET	STARBOARD INCHES	STARBOARD TEMP	STARBOARD GROSS BARRELS
1													
2													
3													
4						12	7-4	100	124.42				
						13	9-6	100	6.00				
5						2	0-2	100	1128.19				
						12	6-4	100	17.47				
6													
7													

GR. GRS. 15.1

NET 196 B.B.L.

FLASH 170

OBSERVER

RECEIVED Steel Barge from The Champlain

Loaded at Gulfport Miss

Pumping Started Steel Barge at Gulfport Miss

TOTAL GROSS BBLS. 1225.06

DEDUCT

TOTAL NET BBLS. 1213.42

J. H. Fitzpatrick GAUGER

A. Gardner GAUGER

359

TAXPAYERS EXHIBIT No. 31

STANDARD OIL COMPANY OF NEW JERSEY

—Fuel Oil Division

26 Broadway

New York, September 25, 1935

TAXPAYERS EXHIBIT # ___ IN EVIDENCE

FILE 350.

S/S CHAMPLAIN

Captain Le Friant.
French Line
Pier 57, North River,
New York, N.Y.

Dear Sir:

We give below tests of the "STANDARD" Bunker Fuel Oil we delivered to the above steamship yesterday, September 24, 1935 at New York:

Barge	No. 124	No. 108
Refinery	Bayonne	
Origin	Mixed	
Specific Gravity	.9652	.9652
A.P.I. "	15.1°	15.1°
Flash Point(closed cup)	170°F	170°F
Viscosity @ 122°F(Saybolt Furol)	156 Sec.	156 Sec.
BTU's	18,524	18,524
Sulphur Content	2.2%	2.2%
Moisture	.2%	.2%

Yours very truly,

J. W. CONNOLLY

DJW:HD
TRIP.

Engine Generator Smoother Performance

278

360

TAXPAYERS EXHIBIT No 38 A

2954

STANDARD OIL COMPANY OF NEW JERSEY

S.S. CHAMPLAIN 26 BROADWAY (ROOM 2020)

NEW YORK CITY

TAXPAYERS EXHIBIT

DATE Sept. 28, 1939

Compagnie Generale Transatlantique,
Pier 57 NR
New York, N.Y.

40
35

CHAMPLAIN

$ 03-22-9500

TERMS

CASH DISCOUNT IF ——— APPLIED TO MOTOR ONLY

Standard Number Fuel Oil	13 122.79 Bbls. 38°a	.95 bbl. FOB Refy.	$ 12	566.61
	Less Voluntary Allowance	.05 bbl.		626.18
			11	939.51
	Lighterage	.05 "		626.18
			$ 12	566.61

OK
ACCT DEPT
REGISTERED

Delivered to S.S. CHAMPLAIN, Pier 57 South Side N.R., New York 9/28/39

A DAY RENTAL OF $4.00 PER DAY WILL BE MADE ON ALL TANK CARS HELD OVER 48 HOURS FREE TIME OF ACTUAL OR CONSTRUCTIVE PLACEMENT. SUNDAYS AND LEGAL HOLIDAYS EXCLUDED. EXCEPT WHEN SUNDAYS AND LEGAL HOLIDAYS COME WITHIN THE FREE 48 HOURS AFTER ARRIVE PLACEMENT.

361

TAXPAYERS EXHIBIT No. 38 B

2954

STANDARD OIL COMPANY OF NEW JERSEY

26 BROADWAY (ROOM 888)

NEW YORK CITY

TAXPAYERS EXHIBIT # - ID IN EVIDENCE

Compagnie Generale Transatlantique,
Pier 57 NR,
New York, N.Y.

46
35

CHAMPLAIN

2616

Standard Number Fuel Oil	3185.71 Bbls. 40°	.25 bbl. Fob Refy.	$ 2 962.62
	Less Voluntary Allowance	.05 bbl.	
	Lighterage	.05 "	

Delivered to S.S. CHAMPLAIN, Pier 57, South Side, North River, N.Y.-9/25/39

A DAY RENTAL OF $10.00 PER DAY WILL BE MADE ON ALL TANK CARS HELD OVER 48 HOURS FROM DATE OF ACTUAL OR CONSTRUCTIVE PLACEMENT. SUNDAYS AND LEGAL HOLIDAYS EXCLUDED, EXCEPT WHEN SUNDAYS AND LEGAL HOLIDAYS COME WITHIN THE FIRST 48 HOURS AFTER CARS PLACEMENT.

280

862
TAXPAYERS EXHIBIT No. 38 A

SEND REMITTANCES TO ROOM 2000, 26 BROADWAY, GLEN FALLS, N. Y. CITY 220

STANDARD OIL COMPANY OF NEW JERSEY

26 BROADWAY (ROOM 2000)

S.S. CHAMPLAIN New York City TAXPAYERS EXHIBIT # 38 A IN EVIDENCE

Compagnie Generale Transatlantique,
610 - 5th Ave.,
New York, N. Y.

August 28,1939
S-5725
P-2650

CHAMPLAIN

- BARGE 58 -

Standard Bunker Fuel Oil	6 706.38 Bbls. @'s	.05 Bbl.	$ 6 370.98
	Less Voluntary Allowance	.05 Bbl.	335.32
	Lighterage	.05 Bbl.	6 037.32
			$ 6 370.98

ACCT. DEPT. REGISTERED

SEP 7 1939

Delivered to:- S.S. CHAMPLAIN, 58 Pier 57 North River, [illegible]

363

TAXPAYERS EXHIBIT No. 35 B

STANDARD OIL COMPANY OF NEW JERSEY
FUEL OIL DIVISION
80 BROADWAY

New York September 9, 1935

File 788

YERS EXHIBIT # 3 IN EVIDENCE

S/S GRIMBARD

French Line,
Pier 57 North River
New York, N.Y. Attention: Capt. Le Friant

Gentlemen:

We give below tests of the "STANDARD" Bunker Fuel Oil we delivered August 31st at New York to the above steamer:

Barge	No. 58
Refinery	Bayonne
Origin	Mixed
Specific Gravity	.9765
A.P.I.	13.4°
Flash Point (Closed Cup)	206°F
Viscosity @ 122°F (Saybolt Furol)	220 sec.
BTU'S	18456
Sulphur Content	2.3%
Moisture	.2%

Yours very truly,

STANDARD OIL COMPANY OF NEW JERSEY

By J. W. CONNOLLY

RJW:MD
FED.

Excellent Gasoline Smoother Performance

282

364

TAXPAYERS EXHIBIT No. 34 A

247

SEND ATTACHED TO ROOM 2000, 26 BROAD ST., NEW YORK, N. Y. CITY

STANDARD OIL COMPANY OF NEW JERSEY

26 BROADWAY (NEW YORK)

TAXPAYERS EXHIBIT #[illegible] IN EVIDENCE

S.S. NORMANDIE

NORMANDIE

Compagnie Generale Transatlantique,
610-5th Ave.,
New York, N. Y.

DATE July 30, 1935

B-4096

Bayonne 61-7543

- BASE 057 -

Standard Bunker Fuel Oil	18 883.70 bbls. 42's	$1.05 bbl. FOB Refy.	$	15 169.89
Less voluntary allowance		.05 bbl.		738.19
LIGHTERAGE		.05 "		738.19
			$	15 169.89

ACCT DEPT.
RECISTERED
Not to be paid unless
duly approved
AUG 6

Delivered to: S.S. NORMANDIE, 88 Pier 88, North River - 7/30/35

365

TAXPAYERS EXHIBIT No. 34 B

247

SEND REMITTANCES TO ROOM 2500, 30 ROCKEFELLER PLAZA, N. Y. CITY

STANDARD OIL COMPANY OF NEW JERSEY

26 BROADWAY (ROOM 2500)

S.S. NORMANDIE — NEW YORK CITY — INVOICE

Compagnie Generale Transatlantique — July 30, 1935

610-5th Ave., — S-4096

New York, N. Y.

Esso — Bayonne — 61-7944

- BARGE 658 -

Standard Bunker Fuel Oil	16 870.15 bbls. 42's	$1.05 bbl. FOB Refy.	$ 17 717.66
Less voluntary allowance		.05 bbl.	
ALLOWANCE		.05 "	
			$ 17 717.66

ACCT DEPT
REGISTERED
AUG 6 1935

Delivered to: S.S. NORMANDIE, RR Pier 88, North River - 7/30/35

366

TAXPAYERS EXHIBIT No. 34 C

STANDARD OIL COMPANY OF N. JERSEY

FUEL OIL DIVISION

26 Broadway

-i-i-

YERS EXHIBIT # 34-C IN EVIDEN

July 20, 1926

M. [redacted]

Capt. Le Priant
French Line
Pier 57 North River
New York, N.Y.

Dear Sir:

We give below tests of the "STANDARD" Bunker Fuel Oil we are delivering to the above steamship at New York:

Date	July 20th
Barge No.	57 - 58
Refinery	Bayonne
Origin	Mixed
Specific Gravity	.9926
A.P.I.	11.5°
FLASH Point (Closed Cup)	194°F.
Viscosity at 122°F. (Saybolt Furol)	168 Sec.
BTU's	18,280
Sulphur Content	2.49%
Moisture	.1%

Very truly yours,

[fol. 367] TAXPAYER'S EXHIBIT 35

Standard Oil Company delivery records Bunker and Diesel, 1928-1934, inc. (34 sheets) (omitted by stipulation, see side folio 379 herein).

TAXPAYER'S EXHIBIT 36

Local Law No. 20 (printed as 21) of 1934 of the City of New York (omitted by stipulation, see side folio 379 herein).

TAXPAYER'S EXHIBIT 37

Local Law No. 24 (printed as 25) of 1934 of the City of New York (omitted by stipulation, see side folio 379 herein).

TAXPAYER'S EXHIBIT 38

Local Law No. 25 (printed as 26) of 1934 of the City of New York (omitted by stipulation, see side folio 379 herein).

TAXPAYER'S EXHIBIT 39

Local Law No. 13 of 1935 of the City of New York (omitted by stipulation, see side folio 379 herein).

[fol. 368] (Here follows Taxpayer's Exhibit 40, photoprints, side folios 369, 370, 371 and 372)

[For the Convenience of Court and Counsel This Exhibit is Bound in on the Opposite Page]

TAXPAYERS EXHIBIT No. 40 (sheet 1)

40
6/26/37 GD

U.S.C.C. BOND NO. 000097

No. 4482

UNITED STATES CUSTOMS SERVICE DISCONTINUED On March 16,1936.

PROPRIETOR'S WAREHOUSE BOND

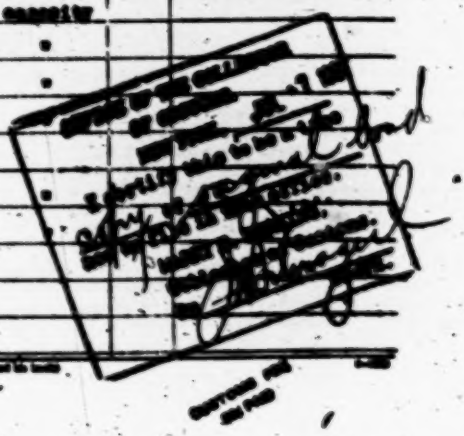
FOR STORAGE AND/OR MANIPULATION OF MERCHANDISE, CLASSES 2, 3, 4, 5, AND 6

Know all Men by These Presents, That STANDARD OIL COMPANY OF NEW JERSEY incorporated under the laws of the State of Delaware, with offices at 26 W Broadway, New York, N.Y. as principal, and UNITED SURETY SHARANTEE COMPANY a corporation duly organized under the laws of the State of New York of 90 John Street, New York, N.Y. , as surety, are held and firmly bound unto the United States of America in the sum of SEVENTY-FIVE THOUSAND ----- dollars ($ 75,000.00), for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this 27th day of June , 1933

Whereas, under the warehouse laws of the United States and the regulations of the Treasury Department made in pursuance thereof, the above-bounden principal has made application to bond the warehouse, or warehouses or premises located in Customs District No. 10 , at the place and for the purposes specified below, namely:

LOCATION (Number, street, city, and State)	CLASS No.	FOR STORAGE OF
The following tanks located at Bayonne, New Jersey on the plant of the Standard Oil Company of New Jersey:	2	Unspecified Goods
Tank #41 70,000 (42 gal.barrel) capacity		
#44 70,000 " "		
#48 70,000 " "		
#46 70,000 "		
#51 68,000 "		
#48 57,000 "		
#43 44,000 "		



Copy 6/26/37

TAXPAYER EXHIBIT No. 40 (sheet 8)

CERTIFICATE AS TO CORPORATE PRINCIPAL

I, H. H. RAMER, certify that I am the _____ secretary of the corporation named as principal in the within bond; that RICHARDSON PRATT, who signed the said bond on behalf of the principal, was then Vice President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

signed H.H.RAMER [CORPORATE SEAL]

INSTRUCTIONS

1. The surety on this bond may be one corporation authorized by the Secretary of the Treasury to act as surety, or not less than two responsible individual sureties. Each individual surety must justify in an amount not less than the penalty of the bond and his affidavit must be shown by affidavit made on Customs Form 5178.

2. A firm, as such, will not be accepted as a surety, nor a partner for copartners or for a firm of which he is a member. Stockholders of a corporate principal may be accepted as sureties provided their qualifications as such are independent of their stock holdings therein.

3. The name, including full Christian name, and residence of each individual party to the bond shall be inserted in the body thereof, and each such party shall sign the bond with his usual signature on the line opposite the scroll seal, and if executed in Maine or New Hampshire, an adhesive seal shall be affixed opposite the signature. The signature of each individual party to the bond shall be witnessed by two persons, who must sign their names as witnesses, followed by their addresses.

4. If the bond is given by persons composing a partnership, the execution of such bond by any member thereof, or by any person holding a power of attorney (which power, or a certified copy thereof, must be filed with the bond) authorizing him to execute the bond on behalf of such partnership, will bind the other partners in like manner and to the same extent as if such other partners had personally joined in the execution. Partnership bonds must be executed in the firm name, with the name of the member or attorney of the firm executing same appearing immediately below the firm signature. The names of all persons composing the partnership must appear in the body of the bond, as, for example, "A. B. and C. composing the firm of A. B. and Co."

5. If the principal or surety is a corporation, the name of the State in which incorporated shall be inserted in the appropriate place in the body of the bond; and the bond shall be executed in the corporate name, immediately followed by the signature of a person duly authorized to act in its behalf; and the bond shall be attested under the corporate seal. If the corporation has no corporate seal the fact shall be stated, in which case a scroll or adhesive seal shall appear following the corporate name.

6. The official character and authority of the person or persons executing the bond for the principal, if a corporation, shall be certified by the secretary or assistant secretary, according to the above form. In lieu of such certificate there may be attached to the bond copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

7. A married woman will not be accepted as surety. If an unmarried woman acts as surety, she must include in her affidavit on Customs Form 5178 a statement setting forth the fact that she is unmarried.

8. Bonds in which alterations and erasures occur must have placed upon them a statement by an agent of the surety company, or by the individual sureties thereon, that such alterations or erasures were made prior to the signing of the bond; or if such alterations or erasures were made after the bond was signed, the consent of all the parties thereto must be written in the bond.

TAXPAYERS EXHIBIT No. 40 (sheet 3)

LOCATION--Continued	CLASS	NOT OWNED BY

Now, Therefore, the Condition of This Obligation is Such, That if the said principal shall comply in all respects with the provisions and requirements of the warehousing laws and regulations of the Treasury Department relating thereto, and surrender and hold the United States and its officers harmless from or on account of any claim, loss, or expense, of any kind or description, connected with or arising from the deposit or keeping or warehousing or manipulating of imported merchandise, including the expense of any labor or description incident to or caused by, the transfer of merchandise from the said warehouse, warehouses, or premises (hereinafter called warehouse), on the discontinuance of the said warehouse existing under bond by virtue of this bond under the laws and regulations relating thereto; and shall not remove, nor suffer to be removed, any merchandise from said warehouse without lawful permit and without the presence of the customs officer in charge, or, in default thereof, shall pay to the collector on demand all duties and charges that may be found to be due on the merchandise so removed, and in the event any merchandise, the duty on which can not be established, is removed from said warehouse without proper permit, if the said principal shall pay to said collector on demand as liquidated damages a sum not to exceed $200 on each package so removed, it being expressly understood and agreed that the liability of said principal under this bond shall extend to all value whose merchandise is lost or stolen from said warehouse, whether the said loss or theft shall result from the fault of said principal or not; and if said principal shall pay to the collector, monthly, the compensation of the customs officers while in charge of said merchandise; and shall receive for storage only such merchandise as may be permitted by law and regulations to be deposited therein, and safely keep the same therein, all in accordance with the laws and regulations relating to the warehousing of merchandise; and shall promptly report to the collector any and all damaged or perishable articles that may be found or stored in said warehouse; and shall observe all laws and regulations relating to the repair and security of said warehouse; and shall not permit any merchandise stored therein to be opened, repacked, or manipulated in any manner except upon permit from the collector issued under law or regulation; and shall, upon the demand of said collector, pay any and all such other amounts or advances, as may be found to be legally due and payable to the United States under and by virtue of any law or regulation made in pursuance of any law thereof, relating to bonded warehouses;

Then this obligation to be void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in the presence of

ACKERS (signed) H.E.ACKERS			STANDARD OIL CO. OF NEW JERSEY
signed ANDREW T.JONES,JR.	2075-86 St.,Brooklyn,		signed [illegible] Assistant Secretary
signed ROBERT HEATER	6468 Fairmont Ave.,Elkins,WV		UNITED STATES GUARANTEE CO.
signed GIRO.DE PINOLA	8483 Bringe Ave.,N.Y.C.		By signed JAMES G.CANNON Attorney-in-Fact
			And
			signed WARD E.FLAXINGTON Assistant Secretary

TAXPAYER'S EXHIBIT No. 40 (sheet 4)

CUSTOMS FORM 300

Customhouse _____

_____, 19__

I HEREBY CERTIFY that the foregoing bond has been duly executed by the obligors therein named; that I have made careful and diligent inquiry into the pecuniary responsibility of the sureties, and that each surety is in my opinion responsible for the payment of an amount equal to the penalty named in said bond.

_____
Collector of Customs.

(To be omitted by officials only when individual sureties are given.)

District No. 10

Port of New York, N.Y.

July 30, 19 29

BOND OF PROPRIETOR OF STORAGE AND/OR MANIPULATING WAREHOUSE

Respectfully referred to the Secretary of the Treasury, Bureau of Customs, for appropriate action.

signed E.C.STEVENS
Assistant Collector of Customs.

TREASURY DEPARTMENT
Bureau of Customs

S.N.S. July 30 S.C.D.

Respectfully returned to the Collector of the Customs, through the Commissioner of Accounts and Deposits, Bureau of Customs Receipts, for consideration as to form and execution.

signed E.N.STEVENS
Chief, Division of Bonds and Special Agents,
Commissioner of Accounts and Deposits.

July 31, 1929.

Examined and approved as to the within corporate surety.

signed E.N.STEVENS E.S.
Chief, Division of Bonds and Special Agents.

DEPARTMENT OF JUSTICE
Bureau of the Solicitor of the Treasury

August 1, 1929.

Examined and approved as to form and execution.

signed E.F.DUNNE
E.F.D. Assistant Solicitor.

Treasury Department
Bureau of Customs

August 2, 1929.

Approved and returned.
By direction of the Commissioner,
signed E.A.HAYWARD
Assistant General Counsel.

E.N.S. A.H.F.

[fol. 373] TAXPAYER'S EXHIBIT 41

Sales Tax Regulations promulgated by the Comptroller of the City of New York under Local Law No. 20 and 24 of 1934 (omitted by stipulation see side folio 379 herein).

EXHIBIT 7, ANNEXED TO RETURN TO PETITION

This exhibit is printed as "Exhibit D", attached to Petition, at side folio 25 herein.

EXHIBIT 8, ANNEXED TO RETURN TO PETITION

(Letterhead of)

Haight, Griffin, Deming & Gardner,

80 Broad Street, New York

October 26, 1937.

Milton Solomon, Esq., Deputy Comptroller, Department of Finance of the City of New York, 50 Lafayette Street, New York, N. Y.

Compagnie General- Transatlantique, 610 Fifth Avenue, New York, N. Y. Notice of Final Determination Dated October 25, 1937, Pursuant to Local Law No. 20 of 1934. Amount Determined Payable, $26,955.70.

DEAR SIR:

With reference to your letter of notice of final determination, dated October 25, 1937, as above, which has been re-[fol. 374] ferred to us by Compagnie Generale Transatlantique, to whom it is addressed, with instructions to us to act as their attorneys at law in this matter, we hereby hand you their check to your order for the sum of $26,955.70 being the amount of taxes, interest and penalties determined in your said letter and notice as and for payment thereof.

This payment is made under protest nevertheless by the said Compagnie Generale Transatlantique as to the whole of the said amount and each and every item and part thereof.

You will please understand that our said client claims that your assessment of said tax against the said Compagnie Generale Transatlantique is erroneous, illegal, improper, excessive and contrary to law, for the reason that said amount is a tax on the purchase price of fuel oil and diesel gas oil purchased and delivered in foreign and interstate commerce; for the further reason that the State and City of New York are therefore without power to impose said tax on said transactions by virtue of the provisions of the Constitution and laws of the United States; for the further reason that the said assessment constitutes a tax on exports in violation of the provisions of Article 1, Section 10, Clause 2, of the Constitution of the United States; for the further reason that the bonded fuel oil, the price of which is thus taxed, is exempt from the City Sales Tax since it never became a part of the mass of property within the City; for the further reason that the said tax was assessed upon the purchase price paid on transactions which did not wholly take place within the City of New York, involving articles [fol. 375] which were used outside the City of New York; and for the further reason that the City of New York is prohibited by Chapter 873 of the Laws of the State of New York of 1934 from taxing the transactions herein referred to.

The said Compagnie Generale Transatlantique reserves all rights to claim refund and repayment to it of the said $26,955.70 paid herewith, or of any part thereof.

Yours very truly, Haight, Griffin, Deming & Gardner,
by Herbert K. Stockton.

HKS:LL:MW.
Enc.

[fol. 376] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Same title]

PETITIONER'S REPLY TO ANSWER OF COMPTROLLER

The petitioner, Compagnie Generale Transatlantique, for a reply to the allegations of the separate answer to the petition herein, respectfully shows to this Court:

1. Admits that between December 10, 1934 and December 31, 1935 petitioner purchased for purposes other than resale

tangible personal property consisting of fuel oil and admits that it refused to pay any tax thereon provided by Local Law No. 20 of 1934 as amended, and alleges that it deposited with the Comptroller the amount of the tax with penalties thereon determined by the Comptroller to be due, accompanying its said deposit with a protest and reservation of its rights to receive back the same, and except as herein expressly admitted or alleged the petitioner denies each and every allegation set forth and contained in paragraph 4 of the respondent's said answer.

2. Denies each and every allegation set forth and contained in paragraph 5 of respondent's said answer, except that it admits that the petitioner did not pay any tax described by Local Law No. 13 of 1935, and alleges that the [fol. 377] petitioner duly deposited the full amount of such tax with all penalties with the Comptroller, accompanying said deposit with its protest and reservation of its rights to receive back the same.

3. Admits that the respondent has promised to annex and make a part of his said answer a duly certified transcript of the record of the said proceedings before the Comptroller, and petitioner reserves its right to point out any errors in the same.

4. Denies that the determination of the Comptroller complained of is in conformity with the law and the facts and is sustained by the record, and except as herein expressly denied petitioner denies knowledge or information sufficient to form a belief as to any of the allegations set forth and contained in paragraph 8 of the respondent's said answer.

Wherefore, petitioner asks the Court for the relief prayed for in the petition herein.

Haight, Griffin, Deming & Gardner, Attorneys for Petitioner, 80 Broad Street, New York, N. Y.

(Sworn to by Jean L. Artur as Assistant General Manager of Petitioner on Nov. 19, 1937.)

[fol. 378] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

OPINION OF BLACK, J.

98 New York Law Journal, page 2205, December 16, 1937

Compagnie Generale Transatlantique v. Taylor, as comptroller, &c.—Motion is granted to the extent of directing the transfer to the Appellate Division in accordance with the provisions of Section 1296 (chapter 526, Laws of 1937, in effect September 1, 1937). The structure of Section 1296, C. P. A., as amended clearly indicates that Special Term is to consider the first five questions only when the determination does not result from the hearings held pursuant to a statutory direction or where questions 6 and 7 are not involved. For introducing the sixth and seventh type of question is the following paragraph:

"Where the determination under review was made as a result of a hearing held, and at which evidence was taken, pursuant to statutory direction, the following questions shall also be determined,"

The treatment accorded to questions 6 and 7 is distinct and different from that accorded to questions 1 to 5. The language of the paragraph introducing questions 6 and 7 is peremptory. It says "the following question *shall* also be determined." In a case such as this, when a hearing precedes the determination and where evidence is taken pursuant to statutory direction, these questions are automatically involved. Question 6 deals with the sufficiency of the evidence, and question 7 deals with the weight of evidence. The papers do not indicate any acts evidencing a waiver or intention not to raise questions 6 and 7. Since [fol. 379] there is nothing for Special Term to pass upon, and since it is clear that the intention of the amendment was to have as heretofore determinations involving questions of fact referred to the Appellate Division, the matter is therefore referred to the Appellate Division. Submit order on notice accordingly.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

[Same title]

STIPULATION AS TO TAXPAYER'S EXHIBITS

It is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that Local Laws No. 20, 24 and 25 of 1934, Local Law No. 13 of 1935, Sales Tax Regulations promulgated by the Comptroller of the City of New York and Taxpayer's Exhibit 35 in Evidence (34 sheets of names and figures, being records of oil deliveries) need not be printed in the record, and it is further

Stipulated and Agreed that copies of the aforesaid Local Laws and Sales Tax Regulations may be presented by either party and used at the hearing and argument before the [fol. 380] Appellate Division, First Department, or the same may be referred to, as if at length printed in the record, and it is further

Stipulated and Agreed that the original or a copy of said Taxpayer's Exhibit 35 in Evidence may be presented to the Appellate Division, First Department, upon the argument herein, or referred to as if at length printed in the record.

Dated, New York, N. Y., January 18th, 1938.

Haight, Griffin, Deming & Gardner, Attorneys for Petitioner. William C. Chanler, Corporation Counsel, Attorney for Respondent.

So ordered: F. M.

[fols. 381-382] STIPULATION WAIVING CERTIFICATION

It is Hereby Stipulated by and between the respective parties herein that the foregoing are true copies of the order transferring the proceedings to the Appellate Division, of the final determination of the Comptroller of the City of New York determining a balance of tax deficiency due from the petitioner, of the petition for the review of said determination and for relief, and of all the papers upon which the Comptroller based his said final determination and upon which the Court below acted in making said order, and of the whole thereof, now on file in the office of the Clerk of the County of New York.

Certification thereof, in pursuance of Section 616 of the Civil Practice Act, is hereby waived.

Dated, New York, February —, 1938.

Haight, Griffin, Deming & Gardner, Attorneys for Petitioner. William C. Chanler, Corporation Counsel, Attorney for Respondent.

[fol. 383] In Supreme Court of New York, New York County

[Title omitted]

Notice of Appeal to the Court of Appeals

Sirs:

Please Take Notice that the respondent hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, dated the 27th day of May, 1938, and entered in the office of the Clerk of said Appellate Division on or about the 14th day of June, 1938, a certified copy of which order was duly filed and entered in the office of the Clerk of the County of New York on or about the 21st day of June, 1938, in so far [fol. 384] as said order annuls the determination of the respondent herein.

Dated, July 14, 1938.

Yours, etc., William C. Chanler, Corporation Counsel, Attorney for Respondent, Office and Post Office Address, Municipal Building, Borough of Manhattan, City of New York.

To Haight, Griffin, Deming & Gardner, Esqs., Attorneys for Petitioner, 80 Broad Street, Borough of Manhattan, New York City. Archibald R. Watson, Esq., Clerk of New York County.

[fol. 385] In Supreme Court of New York, Appellate Division

Present: Hon. Francis Martin, Presiding Justice; Hon. James O'Malley, Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward S. Dore, Justices.

5469

In the Matter of the Application of COMPAGNIE GENERALE TRANSATLANTIQUE, Petitioner, for an Order Against JOSEPH D. McGOLDRICK, as Comptroller of the City of New York, Respondent

ORDER APPEALED FROM—May 27, 1938

The petitioner, Compagnie Generale Transatlantique, having applied, pursuant to Article 78 of the Civil Practice Act, to Special Term, Part I of the Supreme Court of the State of New York, County of New York, for relief or an [fol. 386] order reviewing the final determination of the Comptroller of the City of New York that there is due and payable from the petitioner to the City of New York a balance of tax deficiency of $26,955.70, and for a refund of the said tax with interest or penalties deposited with the respondent by the petitioner, and the said Court having entered an order on December 29, 1937, directing that the proceedings be transferred for disposition to this Court, in accordance with the provisions of Section 1296 of the Civil Practice Act, and the said application having duly come on to be heard on the 3rd day of May, 1938.

Now, after hearing Herbert K. Stockton, Esq., of counsel for petitioner, and Robert Granville Burke, Esq., of counsel for respondent, and after receiving and considering the briefs of H. Maurice Fridlund, Esq., of counsel for Kirlin, Campbell, Hickox, Keating & McGrann, as amici curiae, and George deForest Lord, Esq., of counsel for Cunard White Star Limited, as amicus curiae, and Harold L. Warner, Esq., of counsel for Williamsburgh Power Plant Corporation, as amicus curiae, and due deliberation having been had thereon, it is unanimously

Ordered that the determination of the Comptroller with respect to the deliveries originating in New Jersey be annulled and in other respects confirmed; and it is further unanimously

Ordered that the respondent, Joseph D. McGoldrick, as Comptroller of the City of New York, return to petitioner, Compagnie Generale Transatlantique, the deposit of $26,- [fol. 387] 955.70 heretofore made by petitioner, less the sum of $292.83, the amount conceded as due for the purposes of this application, to-wit, the sum of $26,662.87, with

interest on said sum, together with the costs of the appeal and of this application.

Enter. J. O'M

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION

[Reported in 254 App. Div. 237]

O'MALLEY, J.:

This proceeding to review a determination of the Comptroller of the City of New York, assessing a deficiency tax against the petitioner in the sum of $26,955.70, presents generally the questions, (1) whether sales to the petitioner by the Standard Oil Company of New Jersey of certain bunker fuel and Diesel oil were taxable under Local Law No. 20 of 1934 (New York City Sales Tax Law); and if not, (2) whether they were taxable under the provisions of Local Law No. 25 of 1934 (New York City Personal Property Tax Law).

The petitioner, more commonly known as the French Line, is a French corporation, engaged in the transportation of passengers and freight between the United States and foreign countries. It is authorized to do business in this State and maintains in New York City a general agency for the United States and Canada for the sale of steamship tickets, the soliciting of freight, the operation of its piers, and the purchasing of supplies for its vessels. [fol. 388] The Standard Oil Company of New Jersey is a Delaware corporation. It, too, has offices in New York. Part of its business is the sale of bunker fuel and Diesel fuel oil. It has no storage tanks or other supplies located in New York City. It maintains at Bayonne, New Jersey, a large storage, refining and shipping plant. Another plant is at Bayway, New Jersey.

Bonded Standard bunker "C" fuel oil is refined oil stored in the tanks of the Standard Oil Company, free from the payment of any import duty to the United States, at all times under the supervision of the Customs Service. A bond to insure payment to the United States of any import duty which would become due if the oil should be used for domestic purposes is required. When delivered to a foreign steamship, a release from the bond is granted.

"Drawback" oil is oil imported from South America and refined at Bayonne or Bayway, New Jersey, at the plants of the Standard Oil. An import duty is paid thereon, but upon exportation or delivery to foreign steamships, a refund of such duties is made. Save for a few deliveries originating at Staten Island, all deliveries were of oil of these types.

For many years prior to the enactment of the Local Laws in question, the Standard Oil had agreements with the petitioner for the furnishing of this fuel and Diesel oil to the vessels of the petitioner at their piers in New York City. As certain vessels with a limited draft could dock at Bayonne and there receive the oil, there was a five cent differential placed on oil delivered in Bayonne or in New York City. It does not appear, however, that any deliveries were ever made to the petitioner in New Jersey.

[fol. 389] As refueling of the petitioner's vessels in this city was required to be very expeditious, because of a quick "turn-around", the following procedure was adopted between the petitioner and the Standard Oil. The incoming liner, about forty-eight hours before arrival at the Port of New York, would radio an estimate of the bunker requirements to the petitioner's New York office. Thereupon the petitioner's employee would telephone the Standard Oil shipping clerk in New York City and place the order. It was so timed that the barges on which the oil was transported from New Jersey to the vessel would arrive ten or fifteen minutes after the vessel had completed docking. Thereupon the oil was pumped directly from the barges into the fuel bunkers.

While the contracts between these parties did not specifically require that this oil should come from New Jersey or any other specified locality, the fact is, as already noted, that the only sources of supply for oil of this character in this vicinity controlled by the Standard Oil were its plants in Bayonne and Bayway, New Jersey. Furthermore, the petitioner knew that this would be the immediate source of the fuel oil and, of course, the petitioner had the right, specifically granted in the contracts, to fuel its vessels at Bayonne, were they of sufficiently shallow draught. Moreover, the contracts required delivery to the steamer.

Certain small deliveries in emergency periods were made by oil borrowed by the Standard from competitors, and

two of such deliveries had their origin at Staten Island in New York City, where the competing firm had its oil.

We are of opinion that, with respect at least to the New Jersey originating deliveries mentioned, there could be as-[fol. 390] sessed and collected no tax under the City Sales Tax.

As to those shipments originating in New Jersey, they were interstate transactions, and hence not taxable by the State of New York. The City, deriving its power from the State, could have no greater right. Delivery from New Jersey was the "normal, contemplated and followed course" of dealing (Western Union v. Goster, 247 U. S. 105, 113).

There was here no ending of the interstate transaction, nor had the oil come to rest in this jurisdiction so as to acquire a situs herein. There was no break in transit. Under such circumstances there was an entire and exclusive interstate transaction (Minnesota v. Blasius, 290 U. S. 1).

The oil was immediately, as already stated, pumped from the lighters into the bunkers of the ship and thereupon became a part of the ship. The vessels themselves had no taxable situs here. (Southern Pacific Co. v. Kentucky, 222 U. S. 63; Ayer & Lord Co. v. Kentucky, 202 U. S. 409; People ex rel. Astor Trust Co. v. State Tax Commission, 174 App. Div. 320, 324.)

The situation here is, we think, factually dissimilar from Wiloil Corporation v. Pennsylvania (284 U. S. 169), Banker Brothers v. Pennsylvania (222 U. S. 210) and Matter of McNeel Marble Co. v. Graves (247 App. Div. 242). In the Wiloil case the Supreme Court held itself bound by the finding of the Pennsylvania courts, that the goods had come to rest in Pennsylvania before the sale to a resident of Pennsylvania. Here, the shipments in question never came to rest within this jurisdiction. In the Banker Brothers [fol. 391] case, the article which was the subject of sale had likewise been held to have come to rest in the taxing jurisdiction. This also was true in the McNeel Marble case. These particular shipments seem, therefore, to fall within the purview of National Cash Register v. Taylor (276 N. Y. 208, Certiorari denied 303 U. S. —), where it was held that the City Sales Tax had no application.

As to the emergency deliveries originating at Staten Island, the petitioner concedes for the purpose of this case only that the sales tax of $292.83 should apply. Because of this concession the determination under review with re-

spect to such amount of tax will be confirmed. By such confirmation, however, we are expressing no opinion respecting the taxability of such sales.

Finding, as we do, that the New Jersey shipments never came to rest and acquired no situs in this State and that the interstate or foreign commerce was uninterrupted and continuous, the Personal Property Tax Law also did not apply (Henneford v. Silas Mason Co., 300 U. S. 577, 582; Minnesota v. Blasius, supra, p. 10).

As to the alleged invalidity of this law and the other objections raised thereto by the petitioner, we do not in this decision consider or decide. The City states in its brief that it does not "press its right in this proceeding" in this respect.

It follows, therefore, that the determination of the Comptroller with respect to the deliveries originating in New Jersey should be annulled; otherwise, confirmed as herein indicated.

All Concur.

[fols. 392-393] WAIVER OF CERTIFICATION

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order appealed from, the opinion of the Appellate Division, and all papers upon which said order and opinion are founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Section 170 of the Civil Practice Act or otherwise is hereby waived.

Dated, New York, August 10, 1938.

William C. Chanler, Corporation Counsel, Attorney for Defendant-Appellant. Haight, Griffin, Deming & Gardner, Attorneys for Petitioner-Respondent.

[fol. 394] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Application of

COMPAGNIE GENERALE TRANSATLANTIQUE, Petitioner-Respondent,

For an Order of Certiorari

against

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Defendant-Appellant

NOTICE OF MOTION FOR REARGUMENT, ETC.

SIRS:

Please Take Notice that upon the annexed affidavit of William C. Chanler, verified the 28th day of March, 1939, the papers on appeal, and all the proceedings heretofore had herein, the undersigned will move this Court at a session thereof to be held at the Court of Appeals Hall, Albany, New York, on Monday, the 3rd day of April, 1939, at 2 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for an order

(a) recalling the remittitur herein;

(b) granting a reargument of the appeal herein, and upon such reargument being granted, reversing the order appealed from;

[fol. 395] (c) or, in the alternative, in the event the order appealed from be not reversed, amending the remittitur of this Court dated November 30, 1938, by inserting after the words "be and the same hereby is affirmed with costs," the words, "upon the sole ground that the City sales tax law as here applied violates the Commerce Clause (Art I, sec. 8, cl. 3) of the Constitution of the United States.";

and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., March 28, 1939.

Yours, etc., William C. Chanler, Corporation Counsel of the City of New York, Attorney for Defendant-Appellant, Office and P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

To Haight, Griffin, Deming & Gardner, Attorneys for Petitioner-Respondent, 80 Broad Street, Borough of Manhattan, New York City, N. Y. John Ludden, Esq., Clerk of the Court of Appeals.

[fol. 396] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION FOR REARGUMENT, ETC.

STATE OF NEW YORK,
County of New York, ss:

William C. Chanler, being duly sworn, deposes and says:

1. I am Corporation Counsel of the City of New York, and am familiar with the proceedings in this case.

2. The within appeal involved the validity under the Commerce Clause of the Federal Constitution of Local Law No. 24 of 1934, the New York City sales tax, as applied to respondent's purchases in New York City of bunker fuel oil from the Standard Oil Company of New Jersey.

3. On November 29, 1938, this Court handed down a decision which held that the sales in question constituted con-[fol. 397] tracts for interstate shipments, and which invalidated the City sales tax as applied to those sales on the ground that it constituted a direct tax upon interstate commerce (279 N. Y. 192). The remittitur affirming the order of the Appellate Division, First Department, directed that judgment be entered in accordance with this Court's opinion.

4. Reargument of the appeal is requested on the ground that supervening decisions of the United States Supreme Court require reversal of this Court's decision. Felt & Tarrant Mfg. Co. v. Gallagher, 305 U. S. —, 59 Sup. Ct. 376 (January 30, 1939); Southern Pacific Company v. Gallagher, 305 U. S. —, 59 Sup. Ct. 389 (January 30, 1939); Pacific Telephone & Telegraph Co. v. Gallagher, 305 U. S. —, 59 Sup. Ct. 396 (January 30, 1939); J. Bacon & Sons v. Martin, 305 U. S. —, 59 Sup. Ct. 257 (January 3, 1939). That those decisions determine in the City's favor the questions under consideration, we believe we have shown

in the brief which is part of the motion papers in the companion case, Matter of Felt & Tarrant Mfg. Co. v. McGoldrick, in which a similar application is being made to this Court simultaneously herewith. Of course, the fact that the taxpayer in the present case uses the oil to propel its liners across the ocean has no bearing whatever on the validity of the tax upon the sales, as the cases of Nashville, C. & St. L. Railway Co. v. Wallace, 288 U. S. 249 (1933), and Edelman v. Boeing Air Transp., 289 U. S. 249 (1933), amply attest. Accordingly, upon the authority of the supervening decisions cited above, reargument and reversal should be granted.

[fol. 398] 5. In the event reargument should be denied, or the original determination adhered to, the appellant desires to apply to the Supreme Court of the United States for a writ of certiorari to review this Court's decision. By order of Mr. Justice Stone, dated February 11, 1939, the City's time to petition the United States Supreme Court for certiorari was extended for a period of sixty days from February 27, 1939. The constitutionality of the City sales tax as applied to purchases of this character is obviously of great importance to the City of New York. The present case, and its companion case, Matter of Felt & Tarrant Mfg. Co. v. McGoldrick, are test cases. A great many proceedings which await the final outcome of these cases are pending before the appellant and in the Courts for hearing and determination. Large numbers of purchasers and sellers, and very considerable sums of money are involved.

6. In the two earlier cases of Matter of National Cash Register Co. v. Taylor, 276 N. Y. 208, certiorari denied, 303 U. S. 656 (1938), and Matter of West Publishing Co. v. Taylor, 276 N. Y. 535, certiorari denied, 303 U. S. 656 (1938), it is possible that the denial of certiorari was based upon the Supreme Court's belief that the cases did not present an exclusively federal question. At least one commentator has regarded the Court's denial of certiorari in the National Cash Register case as attributable to the existence of a state question arising under the state enabling act. Lockhart, The Sales Tax in Interstate Commerce, 52 Harvard Law Review 617, 619, note 14 (1939).

7. In order to avoid any doubt on the part of the Supreme Court that the case at bar was decided upon ex-

[fol. 399] clusively federal grounds; it is respectfully requested that the remittitur be amended by inserting after the words "be and the same hereby is affirmed with costs", the words "upon the sole ground that the City sales tax law as here applied violates the Commerce Clause (Art. I, sec. 8, cl. 3) of the Constitution of the United States."

8. We desire to stress the importance of inserting in the remittitur an indication that the federal question under the commerce clause was the sole ground for the decision against the validity of the tax. The objection to inserting the word "sole" which was present in Central Savings Bank v. City of New York, 280 N. Y. 9 (Feb. 21, 1939), is not present here. That case involved the construction of the due process clause, and the identity of phrasing between N. Y. Const., Art. 1, §6 and N. S. Const. XIV Amendment, precluded the use of the word "sole". In the instant case no question as regards the Commerce Clause could arise under any but the U. S. Constitution.

9. The standard formula used where a litigant desires to appeal to the Supreme Court of the United States from a decision of this Court denying a federal right, is not pertinent to the instant case, where the federal right has not been denied but has, according to the contention of the party seeking a further review, been construed too generously in favor of the person asserting it.

Wherefore, your deponent prays that reargument be granted, and upon such reargument, that the order appealed from be reversed; or, in the alternative, that the re-
[fol. 400] mittitur and opinion be amended to show that the decision raised a federal question under the Commerce Clause, and no other questions.

William C. Chanler.

Sworn to before me this 28th day of March, 1939.
William C. McCutcheon, Notary Public, New York County.

[fol. 401] Clerk's certificate to opinion omitted in printing.

[fol. 402] IN COURT OF APPEALS OF NEW YORK

In the Matter of

The Application of COMPAGNIE GENERALE TRANSATLANTIQUE, Petitioner-Respondent,

For an Order

against

JOSEPH D. McGOLDRICK, as Comptroller of the City of New York, Defendant-Appellant

OPINION

CRANE, Ch. J.:

This appeal involves the same question as that presented in its companion case, Matter of Sears, Roebuck & Co. v. McGoldrick, (279 N. Y., 184). Should the principles there stated lead to a different result on the facts in this case?

The Standard Oil Company, having numerous oil tanks in New Jersey, by New York contract sold and delivered oil to the respondent's steamships at its piers in New York City. A tax upon these sales for the period from December 10, 1934 to December 31, 1935, has been set aside below, as an illegal burden upon interstate commerce. The only distinction upon the facts in this case and those in the Sears, Roebuck & Co. case rests in the nature of the respondent's business. The respondent buys two classes of oil for steamships—fuel oil, and Diesel fuel oil. In the briefs these are referred to as "Standard Bunker Fuel Oil" and "Standard Diesel Fuel Oil." The storage tanks containing large quantities of these oils are at Bayonne, New Jersey.

[fol. 403] The contract for the period in question for fuel oil is contained in a letter accepting an offer to extend a previous fuel oil contract until December 31, 1936. It states that the Standard Oil Company of New Jersey is to supply the total fuel oil requirements at New York of all the oil burning vessels of the Compagnie Generale Transatlantique during the period of the contract up to a maximum of four million barrels per year. The maximum price is fixed at $1.10 per barrel, with provision for increases. The contract for the Diesel fuel was also made at New York for a period up to December 31, 1935, not to exceed fifteen

thousand barrels in any one month, and up to, but not exceeding one hundred thousand barrels during the term of one year. Delivery shall be made, by barge provided by the seller to the buyer's vessel at dock within the harbor limits at New York, or to the buyer's vessel alongside dock of seller at New York. The price varies according to the place of delivery.

These two companies have been doing business for many years, and it was well understood that the oil of the Standard Oil Company of New Jersey was stored in thousands of tanks in Bayonne, New Jersey. So far as this record shows, it had no storage facilities in New York City. As the Normandie or the Paris or the Champlain or the Lafayette approached the harbor in New York, messages were sent to the Standard Oil Company's office in New York City indicating the amount of fuel that would be necessary, and with the docking of the steamer at the steamship company's pier, barges of the oil company would soon be alongside prepared to pump the oil into the steamer's tanks. The [fol. 404] oil was brought from New Jersey by the oil company's barges. Both the Standard Oil Company of New Jersey and the Compagnie Generale Transatlantique were doing business in the City of New York. The latter had its piers and office at the foot of Fiftieth Street, and places of business at 19 State Street and 610 Fifth Avenue, Manhattan. The offices of the Standard Oil Company of New Jersey were at 26 Broadway, New York City.

Unless there be some material difference between the sales in this case and those in the Sears, Roebuck case, we shall be obliged to sustain the tax. What difference do we find? In the first place, the Standard Oil Company of New Jersey maintains a large number of oil tanks in Bayonne, New Jersey and the vicinity. The steamship company knew that the nature of the business required oil to be stored in large quantities, and that the oil company had such a plant, and delivered its oil by drawing it off from these tanks into ships at Bayonne, or else into barges, to be carried to vessels at the port of New York. While the purchase or the contract of sale was made in New York, it was with a view of getting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. The product in New Jersey, kept there in tanks, was the thing bargained for. So far as

the record in this case goes, the contract centers around the purchase of the New Jersey oil of the kind and quantity specified. The delivery at the Port of New York was made necessary because of the draft of the steamers. The cost of transportation from Bayonne to the Port of New York increased the price.

In the Sears, Roebuck case the purchaser bought an article in New York according to sample. As long as he got [fol. 405] what he ordered, it was indifferent to him where it came from. The merchandise was very largely stock goods and kept for the convenience of the seller at various depots throughout the State. The ease with which the tax could be evaded by such class of merchandise being stored without the State and sold in New York City by sample was a matter worthy of consideration, as bearing upon competition with New York goods.

Here, on the other hand, there is a special product of the Standard Oil Company of New Jersey which has to be kept in great receptacles built for the purpose which we can treat by analogy as a manufacturing plant. It is the articles of this plant in New Jersey which the purchaser seeks. At the office of the seller in New York it bargains for this oil to be put in its ships. We think, under the principles stated in the Sears, Roebuck case and the authorities there cited, that this is a contract for interstate shipments, and that the tax upon such a sale is a direct tax upon interstate commerce.

The order should be affirmed with costs.

Dissenting Opinion

Finch, J. (Dissenting):

The contract involved in the case at bar admittedly was made in New York for delivery in New York of a standard kind of oil procurable in the open market in New York or elsewhere, at an open market price. While customarily coming from New Jersey, it is admitted that in some instances the seller has resold oil which, pursuant to its rights under the contract, it had purchased in New York. When sold and delivered in this State, the fact that it may be used thereafter in foreign commerce does not prevent [fol. 406] it from being taxable as a sale here (Edelman

v. Boeing Air Transport, Inc., 289 U. S. 249). In addition, since no burden is laid on interstate commerce as such, and no other or different burden than if deliveries had been made by intrastate transportation in New York, the tax is a non-discriminatory one and cannot in any view constitute an undue burden on interstate commerce (Wiloil Corp. v. Pennsylvania, 294 U. S. 169).

The order appealed from should be reversed and the determination of the Comptroller reinstated.

Lehman, O'Brien, Hubbs, Loughran and Rippey, JJ., concur with Crane, Ch. J.; Finch, J., dissents in opinion.

Order affirmed.

[fol. 407] Clerk's certificate to remittitur and orders omitted in printing.

[fol. 408] In Court of Appeals of New York

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of November, in the year of our Lord one thousand nine hundred and thirty-eight, before the Judges of said Court.

Witness, The Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

Remittitur—November 30, 1938

[fol. 409] In the Matter of the Application of Compagnie Generale Transatlantique for an Order vs. Joseph D. McGoldrick, as Comptroller of The City of New York

Be it Remembered, That on the 10th day of September in the year of our Lord one thousand nine hundred and thirty-eight, Joseph D. McGoldrick, as Comptroller of The City of New York, the appellant in this cause, came here unto the Court of Appeals, by William C. Chanler, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Compagnie Generale Transatlantique, the respondent

in said cause, afterwards appeared in said Court of Appeals by Haight, Griffin, Deming & Gardner, its attorneys,

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 410] Whereupon, The said Court of Appeals having heard this cause argued by Mr. William C. Chanler of counsel for the appellant, and by Mr. Herbert K. Stockton of counsel for the respondent—, brief filed by *amici curiae* and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 411] And afterwards, to wit on the 11th day of April, 1939, an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS

Clerk's Office

Albany, November 30, 1938.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 412] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER DENYING MOTION FOR REARGUMENT, ETC.—April 11, 1939

A motion for a reargument of the above cause having been heretofore made upon the part of the above named appellant herein and papers having been duly submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion be and the same hereby is denied.

The remittitur, however, is hereby amended by adding thereto after the words "be and the same hereby is affirmed with costs" the following: "upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (Article 1, Section 8, clause 3) of the Constitution of the United States."

And, the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Rufus Kimball, Deputy Clerk. (Seal.)

[fol. 413] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

ORDER ON REMITTITUR—December 9, 1938

The above-named respondent having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division, Supreme Court, First Department, dated the 27th day of May 1938, filed in the office of the Clerk of said Appellate Division on or about the 14th day of June 1938, a certified copy of which was duly filed in the office of the Clerk of the County of New York, on the 21st day of June 1938, *a certified copy of which was duly filed in the office of the Clerk of the County of New York on the 21st day of June 1938,* in so far as said order annulled the determination of the respondent herein, and the said appeal hav-

ing been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said order so appealed from be affirmed with costs, and having further ordered and adjudged that [fol. 414] the proceedings herein be remitted to the Supreme Court there to be proceeded upon according to law,

Now, on reading and filing the remittitur of the Court of Appeals herein, and upon motion of Haight, Griffin, Deming & Gardner, attorneys for the petitioner, it is

Ordered that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court.

Enter.

A. S., J. S. C.

[fol. 415] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

In the Matter of

The Application of COMPAGNIE GENERALE TRANSATLANTIQUE, Petitioner,

for an order Against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Respondent

JUDGMENT ON REMITTITUR

The petitioner Compagnie Generale Transatlantique having applied pursuant to Rule 78 of the Civil Practice Act for relief or an order reviewing the final determination of the Comptroller of the City of New York that there is due and payable from the petitioner to the City of New York a balance of tax deficiency of $26,955.70 for a refund of the said tax with interest or penalties deposited with the respondent by the petitioner, and an order having been entered on December 29, 1937, directing that the proceedings be transferred for disposition to the Appellate Division of the Supreme Court of the State of New York, First Department, in accordance with the provisions of Section 1296 of the Civil Practice Act, and the said determination of the Comptroller with respect to the deliveries originating in New Jersey having been annulled and in other respects confirmed, and it having been further ordered that the respond-

ent Joseph D. McGoldrick, as Comptroller of the City of New York, return to petitioner the sum of $26,662.87 with interest on said sum, and the costs of the petitioner having [fol. 416] been taxed at the sum of $179.44, costs of said appeal, and the respondent having appealed therefrom to the Court of Appeals, and the said Court of Appeals having sent hither its remittitur filed herein on the 9th day of December 1938, by which it appears that the said Court of Appeals has affirmed the said order in all things with costs, and has given judgment accordingly, and has remitted the said order and judgment of the said Court of Appeals to this Court to be enforced according to law, and this Court having by an order duly entered herein on the 9th day of December 1938 ordered that the said order and judgment be made the order and judgment of this Court, and the petitioner's costs having been duly taxed in the sum of $179.44;

Now, on motion of Haight, Griffin, Deming & Gardner, attorneys for the petitioner, it is

Ordered that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court; and it is further

Adjudged that the order of the Appellate Division be and the same hereby is in all things affirmed with costs, and that the petitioner Compagnie Generale Transatlantique, 50th Street & 5th Ave. West, recover of the respondent Joseph D. McGoldrick as Comptroller of the City of N. Y. Municipal Building, New York City, the sum of $179.44, costs as taxed, and have execution therefor.

Dated, New York, N. Y., December 17th, 1938.

Archibald R. Watson, Clerk.

[fol. 417] Clerk's certificate to order omitted in printing.

[fol. 418] In Supreme Court of New York, New York County

[Title omitted]

Order—April 26, 1939

The defendant-appellant having moved at the Court of Appeals for reargument of the appeal in the above proceeding and the Court of Appeals in an order dated the 11th

day of April 1939, and entered in the office of the Clerk of said Court on or about the same day having denied the motion but amended its remittitur, dated the 29th day of November, 1938 herein by adding thereto after the words "be and the same hereby is affirmed with costs" the following: "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Article 1, Section 8, Clause 3) of the Constitution of the United States",

Now upon reading a certified copy of said order of the Court of Appeals and upon filing the remittitur amended as [fol. 419] aforesaid, it is

Ordered that the said order of the Court of Appeals, dated the 11th day of April 1939, be and the same hereby is made the order of this Court.

Enter.

A. F., J. S. C.

[fol. 420] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 421] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRITS OF CERTIORARI

On consideration of the motions of counsel for petitioner in the above-entitled causes, and good cause therefor having been shown,

It is Now Here Ordered that the time within which petitions for writs of certiorari may be filed herein be, and the same is hereby, extended for a period of 60 days from Feb. 27th, 1939.

Dated, this 11th day of February, 1939.

Harlan F. Stone, Associate Justice of the Supreme Court of the United States.

[fol. 422] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRITS OF CERTIORARI

On consideration of the motions of counsel for petitioner in the above-entitled causes, and good cause therefor having been shown,

It is Now Here Ordered that the time within which petitions for writs of certiorari may be filed herein be, and the same is hereby, extended for a period of 60 days from March 15, 1939.

Dated, this 19th day of April, 1939.

Harlan F. Stone, Associate Justice of the Supreme Court of the United States.

[fol. 423] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 5, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 8 1939
CHARLES ELMORE CROPLEY
CLERK

(26952)

SUPREME COURT OF THE UNITED STATES

No. 943 44 OCTOBER TERM, 1938

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

Application of Commerce Clause to consumers' sales tax on purchases in New York City of oil, filled by shipment from sources of supply outside the State. Error of holding that tax is invalid where non-discriminatory, and possibility of multiple taxation is absent. Error of holding that oil purchases made in city are in interstate commerce merely because seller for its own convenience chooses to ship from outside the State. Holding of court below (1) discriminates against local business by giving unfair competitive advantage to sellers storing merchandise outside the State; and (2) seriously diminishes local tax revenues by creating extensive immunities and fostering tax avoidance and evasion. Conflict between decisions of state courts.

May 3, 1939.

WILLIAM C. CHANLER,
PAXTON BLAIR,
SOL CHARLES LEVINE,
Counsel for Petitioner,
Municipal Building,
Borough of Manhattan,
City of New York.

EDMUND B. HENNEFELD,
MILTON SANDBERG,
JEROME R. HELLERSTEIN,
of Counsel.

Appeal Printing Co., Inc., 130 Cedar St., New York 452

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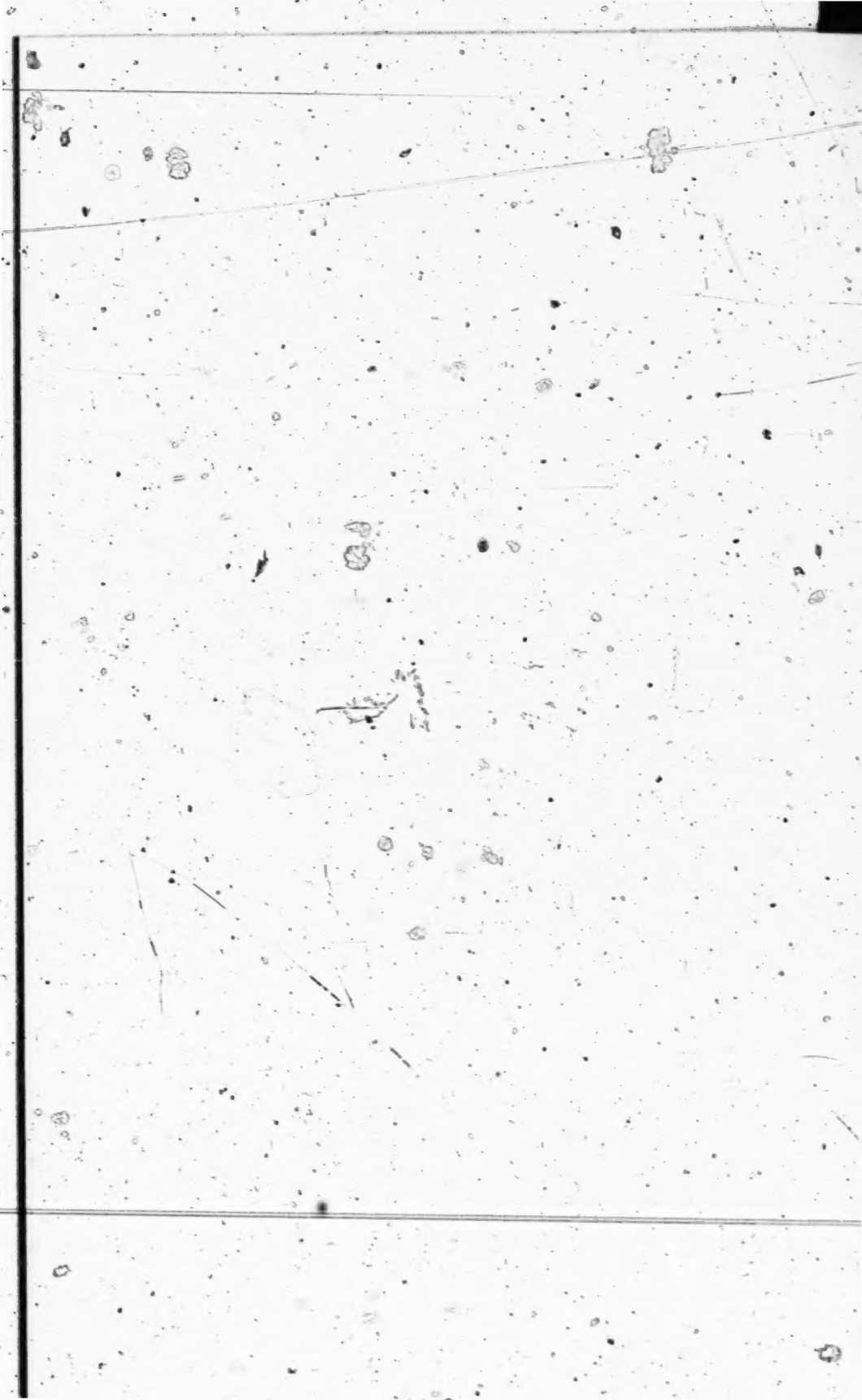

SUPREME COURT OF THE UNITED STATES

No. . OCTOBER TERM, 1938

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

Petition for Writ of Certiorari to Supreme Court of the State of New York

To the Honorable the Supreme Court of the United States:

The petition of Joseph D. McGoldrick, Comptroller of the City of New York, respectfully shows:

1. Your petitioner is the Comptroller of the City of New York, charged by law with the duty of enforcing the tax laws here involved. In conformity with the law of New York, your petitioner was duly substituted prior to the decision of the Court of Appeals sought to be reviewed, in place and stead of Frank J. Taylor, the former Comptroller, who made the original determination of tax liability against the taxpayer. The petition seeks review of a decision of the Court of Appeals of the State of New York (Judge FINCH dissenting), holding that, by virtue of the Commerce Clause, the New York City sales tax could not be imposed upon respondent's purchases of fuel oil. The federal question was, and the Court so stated, the sole question involved in its decision.

2. The present case is a companion case to *Matter of Felt & Tarrant Mfg. Co.* v. *McGoldrick*, 279 N. Y. 678, decided on the same date, where the tax was likewise invalidated. A petition for certiorari in that case is being presented together with the present petition. On the same date was also decided *Matter of Sears, Roebuck & Co.* v. *McGoldrick*, 279 N. Y. 184, rearg. den. 280 N. Y. mem. p. 76, in which case, however, the tax was upheld as not violative of the Commerce Clause.

Jurisdiction and Timeliness

3. The petition for certiorari is made under 28 U.S.C.A., §344, subd. (b); the Court has jurisdiction to grant the writ. *Minnesota* v. *Blasius*, 290 U. S. 1 (1933); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. , 59 S. Ct. 528 (1939).

4. A final order and judgment were entered in the office of the County Clerk of New York County, on December 17, 1938, upon the remittitur of the Court of Appeals filed on December 9, 1938, and upon the order of the Supreme Court of the State of New York, dated December 9, 1938, making the order and judgment of the Court of Appeals the order of the Supreme Court. Thereafter, by order of Mr. Justice STONE, dated February 11, 1939, the petitioner's time to petition this Court for certiorari was extended for a period of sixty days from February 27, 1939; and, by order of Mr. Justice STONE, dated April 19, 1939, such time was again extended for a period of sixty days from March 15, 1939, which latter date was within three months of the original entry of the final order and judgment on December 17, 1938. On April 3,

1939, petitioner duly filed with the Court of Appeals a motion for reargument and to amend the remittitur. On April 11, 1939, the Court of Appeals denied the motion for reargument but granted the motion to amend. On April 26, 1939, an order was entered in the office of the County Clerk of New York County, making the order of the Court of Appeals dated April 11, 1939, the order of the Supreme Court of the State of New York. The petition is timely, either by virtue of Mr. Justice STONE's orders of extension, or because of the decision on the motion for reargument, the amendment of the remittitur on April 11, 1939, and the resultant necessity of entering new orders in the Court where the record lies.

5. The decision of the Court of Appeals was based solely upon the ground that the tax as applied violated the Commerce Clause of the Federal Constitution. This ground of objection to the tax was raised by the taxpayer (respondent here) at the hearing before the petitioner to review petitioner's preliminary determination of tax liability (R. 297-298). Thereafter, it was again raised in the proceeding brought in the Appellate Division under Article 78 of the Civil Practice Act of the State of New York (R. 12). The Appellate Division sustained the objection and annulled petitioner's determination (R. 386-392). Upon further appeal to the Court of Appeals, it was the sole objection urged by the taxpayer in the Court of Appeals. The remittitur, as amended, provides that the order of the Appellate Division appealed from was affirmed,

> "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. I, Sec. 8, Clause 3) of the Constitution of the United States." (280 N. Y. mem. p. .)

The Statute the Validity of Which Is Involved

6. The statute the constitutionality of which is involved is the New York City sales tax law, Local Law No. 20 of 1934 (officially printed at p. 143 of Local Laws of the Cities of the State for 1934 as No. 21), as amended by Local Law No. 24 of 1934 (officially printed at p. 164 as No. 25), and by Local Law No. 23 of 1935 (p. 138), all enacted pursuant to authority conferred by Laws of New York of 1934, ch. 873, p. 1805. These local laws, and the enabling act authorizing them, have been and continue to be renewed annually. The provisions of the local law are printed as Appendix A, the provisions of the state enabling act, as Appendix B.

Opinions Below

7. The opinions of the Court of Appeals are reported in 279 N. Y. 192, the opinion of the Appellate Division in 254 App. Div. 237. The memorandum opinion of the Court of Appeals in the companion *Felt & Tarrant Mfg. Co.* case is in 279 N. Y. 678, which affirmed 254 App. Div. 246. The opinion of the Court of Appeals in *Matter of Sears, Roebuck & Co.* v. *McGoldrick*, decided on the same day but sustaining the tax, is reported in 279 N. Y. 184, the memorandum opinion of the Appellate Division in 254 App. Div. 669. Copies of the opinions of the Court of Appeals in the three cases and of the Appellate Division in this case are attached hereto as Appendix C.

Summary Statement of the Matter Involved

8. The City sales tax law in question imposes a nondiscriminatory tax of 2% upon every sale of tangible personal property in the City of New York, the tax being

paid and borne by the purchaser. A sale is defined as "any transfer of title or possession or both"; a retail sale as, a sale "for any purpose other than for resale". The respondent's purchases which were the subject of the tax were made pursuant to contracts and in a manner described more fully in the subjoined brief. The contracts were entered into in New York City and called for the sale and delivery in New York City of standard fuel oil of a kind which the seller was at liberty to obtain either from a supply in New York City or by shipment from storage tanks maintained by it across the Hudson River opposite New York City, the contracts containing no provision requiring the oil to come from New Jersey or anywhere else.

Questions Presented

9. The questions presented in the case are as follows:

   (a) Does the New York City tax as applied to respondent's purchases of fuel oil impose an unconstitutional burden on interstate commerce?

   (b) Do respondent's purchases of fuel oil "require or necessarily involve transportation across the state boundary" in the sense in which those words were used in *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 174 (1935)?

Assignment of Errors

10. It is submitted that the Court of Appeals erred:

   (a) In holding that the New York City sales tax as applied to the respondent's purchases constituted an unconstitutional burden on interstate commerce.

(b) In holding that the purchases which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of the *Wiloil* case, *supra*.

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Reasons for Allowance of the Writ

11. The reasons relied on by petitioner for allowance of the writ are as follows:

(*a*) Petitioner contends that in holding that the City sales tax law as applied to respondent's purchases of fuel oil constitutes an unconstitutional burden on interstate commerce the Court of Appeals has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court, which we cite in the subjoined brief; for, the Court has held invalid a type of local consumers' tax which (*i*) does not discriminate against or otherwise burden interstate commerce, and (*ii*) is so limited in its operation that there is no possibility of multiple taxation.

(*b*) Petitioner suggests that in holding that the particular transactions taxed required or necessarily involved interstate commerce, the Court of Appeals has decided a second federal question of substance in a way probably not in accord with applicable decisions of this Court: *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 (1935), and *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210 (1911).

(*c*) These are test cases. A great many proceedings are pending which await their final outcome. Large numbers of purchasers and sellers and sums of money running into millions of dollars annually are involved. In New York City, in particular, a huge business is done every year in a manner similar to that here described, for a large number of purchasers in the City of New York place orders which, by reason of the seller's own choice or convenience, are filled from out-of-state sources.

(*d*) The decision of the Court of Appeals unduly limits the taxing power of the States, and does so in such a way as to give industries a motive for moving their plants or warehouses out of the State while maintaining selling offices within the State. By thus causing a loss of wealth and employment to the State, it will bring about a shrinkage of revenues from other taxes.

The Commerce Clause should not be twisted into a device calculated to prejudice local vendors by subjecting them to unjustifiable competitive disadvantages in their appeal to the same local market. A considerable number of states and localities are imposing consumers' taxes like the New York City sales tax here involved, and are undoubtedly confronted with precisely the same question under the Commerce Clause.

(*e*) The decision of the Court of Appeals that respondent's purchases taxed are in interstate commerce, conflicts with the decision of the highest court of the State of West Virginia where a similar question was raised and decided. *Lewis* v. *City of Bluefield*, 117 W. Va. 782, 188 S. E. 237 (1936).

WHEREFORE, petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court,

directed to the Supreme Court of the State of New York, in and for the County of New York, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court in this cause, to the end that the case may be reviewed and determined in this Court, as provided in 28 U.S.C.A., §344, subd. (b); and that the final order and judgment of the said Court, and every part thereof, may be reviewed and corrected by this Court in conformity with the Constitution and laws of the United States; and that the said final order and judgment may be reversed and petitioner's original determination of tax liability on the part of the respondent confirmed; and petitioner prays for such other and further relief as to this Court may seem just and proper; and petitioner will ever pray.

Dated: New York, N. Y., May 3, 1939.

JOSEPH D. MCGOLDRICK,
Comptroller of the City of New York,
Petitioner,

By SOL CHARLES LEVINE,
Counsel for Petitioner,
Municipal Building,
Borough of Manhattan,
City of New York.

SUPREME COURT OF THE UNITED STATES

No. . October Term, 1938

Joseph D. McGoldrick, Comptroller of the City of New York,
Petitioner,
against
Compagnie Generale Transatlantique.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of the Case

The respondent steamship company, upon which the tax was imposed as purchaser, maintains physical pier properties and offices at the foot of West 50th Street, New York City. It also maintains places of business at 19 State Street and 610 Fifth Avenue, New York City. The latter comprise its freight, passenger, operating, publicity, accounting, executive and purchasing offices (R. 93-94). The Standard Oil Company of New Jersey from which respondent made the purchases of fuel oil involved in this case, maintains offices at 26 Broadway and in Rockefeller Center, and storage tanks and other facilities at Bayonne and Bayway, New Jersey (R. 169, 179, 261).

The bunker "C" fuel oil purchased by respondent from its vendor is a standard kind of oil (R. 203, 280-282).

It is procurable on the open market at an "open market price" (R. 311). It has no special quality not shared by the oils of other vendor companies (R. 203, 280-282). Any bunker "C" fuel oil becomes "Standard" oil merely if the Standard Oil Company chooses to buy and sell it (R. 280, 282).

The same kind of oil was actually furnished by the Standard Oil Company to the respondent from the supplies of other oil companies, including the Shell Oil Company, the Mexican Petroleum Company, the Tidewater Oil Company and the Gulf Oil Company (R. 203, 280-281, 284-285, 293, 852-853, 855, 877-878). On those occasions there was a representation by the Standard Oil Company that the oil so furnished was Standard bunker "C" fuel oil (R. 281-283, 285), and the Standard Oil Company did not even bother to mention that it was supplying the fuel oil from sources other than its own tanks (R. 202, 220-221, 239). The oil so delivered met all the specifications of the orders (R. 224-225, 281-282, 282-283).

Included in the oil furnished to the respondent by the Standard Oil Company was oil of the Gulf Oil Company drawn from the latter's storage tanks in New York City (R. 199, 210, 285).

The long-term requirement contracts pursuant to which the respondent obtains its oil from the Standard Oil Company are embodied in a series of letters over the period from 1927 to 1933 (Taxpayer's Exhibits 1-13, R. 299-319), and a Diesel oil agreement dated January 23, 1935 (Taxpayer's Exhibit 14, R. 320). The contracts, which are between the French Line, 19 State Street, New York City, and the Standard Oil Company, 26 Broadway, New York City (R. 299, 309, 311), were all negotiated and signed in the City of New York (R. 102, 106, 132, 140).

Neither the letters nor the agreement contain any provision requiring the oil to come from New Jersey or from anywhere else. No mention is made in them of a shipping point, the oil being sold merely "delivered" (R. 299, 301-305, 311, 317). Respondent is never notified, nor does it ever ascertain, where shipment is to be made from or where it is actually made from (R. 202, 220). So far as the use of the oil is concerned, the source of supply makes no difference whatever (R. 156, 158, 245).

The specific purchases here involved are made in the following manner: Respondent's New York City office telephones the office of the Standard Oil Company at 26 Broadway and places the order (R. 172, 174-175, 231). The respondent's employee states to the Standard Oil Company's employee merely the quantity of oil to be delivered and the time and place; he makes no mention of the source of shipment (R. 175).

The Standard Oil Company's Broadway office thereupon communicates with its storage plants in New Jersey, or some other available source of supply which it selects (R. 203, 280-281, 284-285). The oil is then delivered by barge to the respondent's ship at its New York City pier (R. 142, 426). As long as respondent gets what is ordered, it is a matter of indifference to it where the oil comes from (R. 224-225, 281-282, 282-283). All deliveries taxed, without exception, were made at respondent's New York City pier (R. 142). All invoicing and payment is accomplished in New York City (Taxpayer's Exhibits 32-A, 32-B, 33-A, 34-A, 34-B, R. 360-365).

The ease with which the tax can be evaded merely by setting up a source of supply across the Hudson River opposite New York City, is a matter well known to persons selling merchandise in New York City.

The City sales tax imposed upon these purchases is a general non-discriminatory tax of 2% upon every "transfer of title or possession or both", in the City of New York, of tangible personal property purchased for consumption and not for resale. The tax is paid by the purchaser. It is ordinarily collected by the vendor, but if not, is payable by the purchaser directly to the petitioner, as City Comptroller. In the present proceeding, the tax was imposed directly upon respondent as purchaser. As a matter of state law, the tax does not apply where goods, although purchased in New York City, are to be delivered to consumers outside the City. Article 94 of the Comptroller's Regulations; *Matter of C. G. Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148 (1938). No license is required of either purchaser or vendor as a condition of making the sale.

Assignment of Errors

The Court will find our Assignment of Errors at page 5 of the petition, *supra*.

Jurisdiction

The Court is referred to the jurisdictional statement at page 2 of the petition, *supra*.

POINT I

The New York City sales tax, as applied to the respondent's purchases, does not impose an unconstitutional burden on interstate commerce.

The question is whether the tax as applied to respondent's purchases imposes a direct and immediate burden on interstate commerce. Such burden, to be the basis for invalidation, would have to be actual and not merely theoretical. The main types of applicable situations in which an unconstitutional burden has been found to be present were recently summarized in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939). It is settled by that and other leading cases on the subject that where a tax is nondiscriminatory, and where it does not impose unwarranted licensing requirements, it will be upheld provided there is no possibility of multiple taxation. *Western Live Stock* v. *Bureau*, 303 U. S. 250 (1938); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *Coverdale* v. *Arkansas-Louisiana Pipeline Co.*, 303 U. S. 604 (1938); *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939).

Measured by these standards, the tax at bar is clearly valid:

There is no undue burden on interstate commerce.

1. Purchasers from foreign vendors are required to pay the same tax as purchasers from local vendors, and no more. Foreign vendors are placed under the same obligation with respect to collecting the tax as local vendors. Foreign products are not discriminated against. On the other hand, local vendors, local products and local busi-

ness would be discriminated against were the tax at bar to be held invalid.

2. Interstate commerce is not interfered with by the imposition of unwarranted licensing requirements, conditions precedent to interstate selling, and the like. No license is required of purchasers or vendors. If the purchaser omits to pay the tax, he is not forbidden to make the purchase; the purchase takes place just the same.

3. In the case at bar there is no possibility of multiple taxation. The tax is not one on the gross receipts of a vendor imposed by the vendor's State; it is on the purchases of a local consumer. The tax is upon the purely local acquisition of property in the local market.

With respect to analogous taxes on consumers, the Court has already held that the state in which the consumer is may tax him. Thus, it has sustained the following consumer's taxes imposed by the buyer's state, viz.: a motor fuel (sales) tax (*Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 [1933]), a use (sales) tax (*Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 [1934]), a "receiving" (sales) tax (*J. Bacon & Sons* v. *Martin*, 305 U. S. 380 [1939]), or a property (sales) tax (*Hinson* v. *Lott*, 8 Wall. 148 [1868]). On the other hand, the Court has barred similar taxes imposed by the seller's state (*J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 [1938]); *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 [1939]). Since the tax on the sales at bar is imposed by the *purchaser's* State and the tax could not be imposed on the same sales by the *seller's* State, there is no possibility of double or multiple taxation.

Since there is no possibility of multiple taxation, there is no necessity for allocation, assuming allocation to be

administratively feasible in respect of a tax on a purchaser-consumer. The fact that multiple taxation is not possible itself results in a species of allocation: New York City taxes New York City purchasers on their purchases in that City, and New Jersey taxes New Jersey purchasers on their purchases there. New Jersey could not claim the right to tax respondent on its acquisition of property in New York City, any more than New York City could tax a New Jersey purchaser on his acquisition of property in New Jersey. The doctrine of extraterritoriality as well as that of multiple taxation would forbid such a result.

4. Unless the tax at bar is sustained, foreign vendors will obtain unjustifiable advantages over local competitors who are required to collect the 2% tax. Business will be encouraged to flee the taxing state and seek a point of vantage in neighboring states from which to make the identical sales free of tax. Thus, new forms of tax avoidance and evasion will be fostered. There is no sound reason why respondent should be permitted to escape the sales tax merely because it buys its oil from the Standard Oil Company with its tanks across the Hudson River in New Jersey, rather than from the Gulf Oil Company with its tanks in New York City.

Comparable taxes have always been upheld.

So far as we are aware, this is the first case presented to this Court in which a purchaser-consumer has complained that a retail sales tax levied upon him imposes an invalid burden on interstate commerce. This Court has never held such a tax upon the purchaser invalid.

Moreover, so far as we know, this Court has never held invalid a tax imposed by the buyer's state upon interstate sales measured by the value or volume of the sales. See, in this connection, the scholarly analysis of the cases in LOCKHART, *The Sales Tax in Interstate Commerce*, 52 Harvard Law Review 617, 629 (1939).

In every case where this Court has had before it a tax to which the City sales tax is at all comparable, it has upheld the tax against attack based upon the Commerce Clause. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 305 U. S. , 59 Sup. Ct. 376 (January 30, 1939); *Southern Pacific Company* v. *Gallagher*, 305 U. S. , 59 Sup. Ct. 389 (January 30, 1939); *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 305 U. S. , 59 Sup. Ct. 396 (January 30, 1939); *J. Bacon & Sons* v. *Martin*, 305 U. S. 380 (January 3, 1939); *Western Live Stock* v. *Bureau*, 303 U. S. 250 (1938); *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937); *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 (1935); *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934); *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249 (1933); *Nashville, C. & St. L. Railway Co.* v. *Wallace*, 288 U. S. 249 (1933); *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932); *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210 (1911); *Woodruff* v. *Parham*, 8 Wall. 123 (1868); *Hinson* v. *Lott*, 8 Wall. 148 (1868).

The above are all instances of non-discriminatory local taxes applied to transactions connected with interstate commerce. In almost all, the burden of the tax fell on the local purchaser-consumer. In almost all, it may be added, the tax was measured by the value or volume of the sales. The New York City sales tax is not distinguishable in any material particular from most of the taxes upheld in the cases cited above.

The New York City sales tax is, moreover, *identical* in substance with the California tax (Cal. Laws of 1935, ch. 361, as amended by Cal. Laws of 1937, chs. 401, 671 and 683) sustained in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra,* as the following tabular comparison plainly shows:

California Tax	New York City Tax
1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.	1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.
2. The tax is a given percentage of the sales price.	2. The tax is a given percentage of the sales price.
3. The tax is paid by the purchaser at the time of the sale.	3. The tax is paid by the purchaser at the time of the sale.
4. The tax is collected by the vendor, who files the returns.	4. The tax is collected by the vendor, who files the returns.
5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.	5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.
6. The tax law requires the vendor to insure payment of the tax if it fails to make the collections from the tax debtors.	6. The tax law requires the vendor to insure payment of the tax if it fails to make collections from the tax debtors.
7. The tax is on a local event, *i.e.*, "the exercise of any right or power * * * incident to the ownership of that property" other than resale.	7. The tax is on a local event, *i.e.*, the "transfer of title or possession or both" for any purpose other than resale.

The fact that the California tax is termed a "use" tax and the New York City tax a "sales" tax is a difference in words, not a difference in substance. For, "use" as defined in the California statute (see, paragraph 7 in the tabular comparison above), includes every acquisition of possession and so, every sale. A mere difference in name between two taxes which are substantially the same does not justify varying constitutional treatment. As stated by this Court in *Southern Pacific Company v. Gallagher, supra,* 305 U. S. , 59 Sup. Ct. 389, 394:

> "State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon the choice of the thing taxed". (Italics ours.)

It thus appears that in invalidating the City sales tax in the case at bar, the Court of Appeals has decided the case in a way probably not in accord with applicable decisions of this Court.

POINT II

Respondent's purchases do not "require or necessarily involve interstate shipment", as that phrase is used in *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, 174.

The Court of Appeals held that respondent's purchases required or necessarily involved interstate commerce as that phrase is used in the *Wiloil* case. We submit that in so holding, the Court misapprehended not only that case but also *Banker Brothers* v. *Pennsylvania,* 222 U. S. 210 (1911).

In the *Wiloil* case, *supra,* as in the case at bar, the sale was made in the buyer's State, called for delivery of

the merchandise in that jurisdiction, and related to unascertained goods, viz., fuel oil. Despite the fact that the contracts called for delivery in Pennsylvania of oil "f.o.b. Wilmington, Delaware," this Court concluded that the contracts did not require or necessarily involve interstate shipment, stating, in language precisely applicable at bar (294 U. S., at p. 173):

> "Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania."

And further (p. 174):

> "There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought in from another State, for that would unduly trammel state power of taxation and produce gross inequality and injustice. *Woodruff* v. *Parham*, 8 Wall. 123, 137. *The limitation appellant puts on §4 would operate to the extent of three cents a gallon in favor of liquid fuels delivered, as in this case, from a place in another State, against those delivered in Pennsylvania from sources in that Commonwealth over routes wholly therein.*" (Italics ours.)

The Court indicated in a general way that the tax was upon the local sales. It pointed out, moreover, that the fact that the entire movement of the oil from Delaware into Pennsylvania involved interstate commerce—which would have been material had federal regulation

been involved—was not pertinent when the inquiry was directed to state taxation of local sales (p. 175).

Finally, the Court summarized the transaction involved and the effect of the tax imposed upon it, as follows (p. 175):

> "As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 604. *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 412-413. The act lays no burden on interstate commerce as such, and if any can be said to result from the imposition, it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources."

Conclusion

The Commerce Clause does not require that in an effort to avoid undue burdens on interstate commerce, sales made within the State, under contracts made there, of goods shipped in (for the seller's convenience or economy) from outside the State, be exempted from a general consumer's sales tax. Such a tax, paid as it is by the consumer and measured by the volume of sales, is not duplicated in any other State, for the act taxed—the final passage of possession and title to the *res* to the consumer—can occur in but one State. Local merchants must be protected against unjustifiable discrimination in favor of foreign vendors. The States must be protected against the serious impairment of their revenue powers by the encouragement of tax avoidance and evasion. Respondent obtains the protection of the laws of New York for its purchases there and should not be permitted to escape the common burden of all purchasers in the local market.

The petition for certiorari should be granted.

Dated: New York, N. Y., May 3, 1939.

Respectfully submitted,

WILLIAM C. CHANLER,
PAXTON BLAIR,
SOL CHARLES LEVINE,
Counsel for Petitioner.

EDMUND B. HENNEFELD,
MILTON SANDBERG,
JEROME R. HELLERSTEIN,
of Counsel.

APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1934.

No. 24

A Local Law to Amend Local Law Number Twenty of the Year Nineteen Hundred and Thirty-four to Relieve the People of the City of New York from the Hardships and Suffering Caused by Unemployment and the Effects Thereof on the Public Health and Welfare, by Imposing a Tax Upon Receipts from Sales of Certain Properties and Rendering of Certain Services in the City of New York, to Enable Such City to Defray the Cost of Granting Unemployment Work and Home Relief.

Be it enacted by the Municipal Assembly of The City of New York as follows:

Section 1. Local law number twenty of the local laws of the city of New York for the year nineteen hundred and thirty-four, entitled: "A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief," is hereby amended so as to read as follows:

Appendix A

Tax on sales of certain properties and rendering of certain services in the city of New York:

Section 1. Definitions.
2. Imposition of tax.
3. Collection of tax from purchaser.
4. Records to be kept.
5. Returns.
6. Payment of taxes.
7. Determination of tax by the comptroller.
8. Proceedings to recover tax.
9. Notices and limitations of time.
10. Refunds.
11. General powers of the comptroller.
12. Administration of oaths and compelling testimony.
13. Reference to tax.
14. Registration.
15. Penalties.
16. Returns to be secret.
17. Disposition of revenues.
18. Application; construction.

§ 1. Definitions. When used in this local law:

(a) The word "person" includes an individual, copartnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

(d) The word "receipt" means the amount of the sale price of any property or the charge for any service specified in section 2 of this local law, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever;

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

(f) The words "tangible personal property" mean corporeal personal property;

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

(h) The word "semi-public" means those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowment and are not organized or operated for profit;

Appendix A

(i) The word "return" includes any amended return filed or required to be filed as herein provided;

(j) The word "comptroller" means the comptroller of the city of New York.

§ 2. Imposition of tax. During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

(b) Gas, electricity, refrigeration and steam, and gas, electric, refrigeration, steam, telephone and telegraph service, for domestic or commercial use;

(c) Food, drink and entertainment in restaurants, cafes and other establishments including in the amount of such receipts any cover or minimum or other charge made to patrons where the charge to the patron is one dollar or more, in which event the tax is imposed on the full amount of the charge to each such patron;

(d) Wines and liquors and other alcoholic beverages, and drinks compounded thereof or therewith, except beer or other similar malt beverages, including sales thereof in restaurants, cafes, bars and other places for consumption on the premises;

Appendix A

SCHEDULE A

Cereals and cereal products;
Milk and milk products;
Meat and meat products;
Fish and fish products;
Eggs and egg products;
Vegetables and vegetable products;
Fruits, spices and salt;
Sugar and sugar products, other than candy and confectionery;
Coffee and coffee substitutes; beer or other similar malt beverages; tea, cocoa and cocoa products; other than candy and confectionery;
Water, when delivered to the consumer through mains and pipes;
Drugs and medicines sold upon a physician's prescription;
Newspapers and periodicals.

The enumeration in this schedule shall not be deemed to exclude sales of wines and liquors and other alcoholic beverages, soft drinks, and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith (other than coffee, tea and cocoa, beer and other similar malt beverages), nor any food or food products unless sold for human consumption, from the tax imposed by this local law.

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or

otherwise without power to impose a tax shall not be subject to tax hereunder.

Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale.

Where a purchaser has failed to pay and a vendor has failed to collect a tax upon a sale or service, as imposed by this local law, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered.

The comptroller may, wherever he deems it necessary for the proper enforcement of this local law, provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed, at such times as returns are required to be filed and payment over made by vendors.

The tax imposed by this local law shall be paid upon all sales made and services rendered on and after Decem-

ber tenth, nineteen hundred and thirty-four, although made or rendered under a contract dated prior to December tenth, nineteen hundred and thirty-four. Where a service is billed on either a monthly or other term basis, the bill for such month or other terms shall be a receipt subject to the tax herein imposed provided that where such bill includes a period prior to December tenth, nineteen hundred and thirty-four, or subsequent to December thirty-first, nineteen hundred and thirty-five, such bill shall be equitably apportioned. The comptroller may provide by regulation that the tax upon receipts from sales on the installment plan may be paid on the amount of each installment and upon the date when such installment is due. He shall provide by regulation for the exclusion of amounts representing sales where the contract of sale has been cancelled and/or the property returned and/or the receipt has been ascertained to be worthless, or, in case the tax has been paid upon such receipts, for a credit and/or a refund of the amount of the tax upon such receipts, upon application therefor as provided in section 10.

For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property and services mentioned in this section are subject to the tax until the contrary is established, and the burden of proving that a receipt is not taxable hereunder shall be upon the vendor or the purchaser, unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate to the effect that the property or service was purchased for resale.

Appendix A

No person engaged in the business of selling property or services the receipts from which are subject to tax under this local law shall advertise or hold out to the public in any manner directly or indirectly that the tax imposed by this local law is not considered as an element in the price to the purchaser.

§ 3. Collection of tax from purchaser. The comptroller shall by regulation prescribe a method or methods and/or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this local law so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a vendor shall, as far as practicable, equal two percentum of the total receipts from the sales and services of such vendor upon which a tax is imposed by this local law. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

§ 4. Records to kept. Every vendor shall keep records of receipts and of the tax payable thereon, in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 5. Returns. Every vendor shall file with the comptroller a return of his receipts and of the taxes payable thereon for the periods ending February twenty-eighth, May thirty-first, August thirty-first and December thirty-first, nineteen hundred and thirty-five. Such returns shall be filed within thirty days from the expiration of the period covered thereby. The comptroller may permit returns to be made by other periods so as to include all receipts during the period from December tenth, nineteen hundred and thirty-four, to December thirty-first, nineteen hundred and thirty-five, inclusive. If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of receipts to be made for other than the aforesaid periods and upon such dates as he may specify.

The form of returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this local law. The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 6. Payment of taxes. At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. All taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any

vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to secure the payment of any tax and/or penalties due or which may become due from such vendor. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon such sale, the surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities.

§ 7. Determination of tax by comptroller. If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient the comptroller shall determine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The comptroller shall give notice of such determination to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser against whom it is assessed shall be entitled to and within thirty days after the giving of notice of such determination apply to the comptroller for

a hearing, or shall cause the same to be reviewed by certiorari, or unless the comptroller of his own motion shall reduce the same. If no opportunity for a hearing shall have been given to such person prior to the determination of the comptroller, such person may within thirty days after the comptroller shall give notice thereof, apply to the comptroller for a hearing. After such hearing the comptroller shall give notice of his determination to the applicant. The determination of the comptroller may be reviewed by certiorari if application is made to the comptroller therefor within thirty days after the giving of notice thereof. Whenever under this local law an order of certiorari is permitted it shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice of the supreme court of the state of New York shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 8. Proceeding to recover tax. Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy

upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued, and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comp-

troller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 9. Notices and limitations of time. Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this local law or in any application made by him or if no return has been filed or application made then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

§ 10. Refunds. The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller

if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made. The comptroller may, in lieu of any refund required to be made, allow credit therefor on subsequent payments due from the applicant. Notice of the determination of the comptroller of any application for refund shall be given to the applicant, who shall be entitled to a certiorari order to review such determination, provided application therefor is made within thirty days after the giving of such notice. An order of certiorari shall not be granted hereunder except in accordance with the provisions of section 7.

§ 11. General powers of the comptroller. In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and for cause shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To request information from the tax commission of the state of New York relative to any person; and to afford information to such tax commission relative to any

person, any other provision of this local law to the contrary notwithstanding;

(e) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York;

(f) To prescribe methods for determining the receipts from sales made or services rendered in the city of New York.

§ 12. Administration of oaths and compelling testimony. The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any mate-

rial matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 13. Reference to tax. Wherever reference is made in sales tags or placards or advertisements to this tax, such reference shall be substantially in the following form: "City sales tax for relief of unemployed," except that in any evidence or memorandum of sale issued or employed by the vendor the word "tax" will suffice.

§ 14. Registration. On or before January tenth, nineteen hundred and thirty-five, or in the case of vendors commencing business after January seventh, nineteen hundred and thirty-five, or opening new places of business after such date, within three days after such commencement or opening, every vendor required to collect the tax imposed by this local law shall file with the comptroller a certificate of registration in a form prescribed by the comptroller who shall within five days after such registration issue without charge to each such vendor a (certificate of authority empowering such vendor to collect the tax from the purchaser) and duplicates thereof for each additional place of business of such vendor. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be

prominently displayed in the places of business of the vendor. A vendor who has no regular place of doing business shall attach such certificate to his cart, stand, truck, or other merchandising device. Such certificates shall be non-assignable and non-transferable and shall be surrendered immediately to the comptroller upon the vendor's ceasing to do business at the place therein named.

A vendor shall refuse to accept a certificate that any property or service upon which a tax is imposed by this local law is purchased for resale and shall collect the tax imposed by this local law unless the purchaser shall have filed a certificate of registration and received a certificate of authority to collect the tax imposed by this local law; provided, however, that the payment of the tax by such purchaser shall not relieve the purchaser of the duty herein imposed upon such purchaser to collect the tax upon any resale made by him; but such purchaser who shall thereafter file a certificate of registration and receive a certificate of authority to collect the tax may, upon application therefor, receive a refund of the taxes paid by him upon property and services thereafter resold by him and upon the receipts from which he shall have collected and paid over to the comptroller the tax herein imposed.

§ 15. Penalties. Any person failing to file a return or to pay or pay over any tax to the comptroller within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable,

may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any vendor or purchaser and any officer of a corporate vendor or purchaser failing to file a return required by this local law, or filing or causing to be filed or making or causing to be made or giving or causing to be given any return, certificate, affidavit, representation, testimony or statement required or authorized by this local law, which is wilfully false, and any vendor and any officer of a corporate vendor wilfully failing to file a registration certificate or to display or surrender the certificate of authority as required by this local law or assigning or transferring such certificate of authority, and any vendor and any officer of a corporate vendor wilfully failing to charge separately from the sales price the tax herein imposed, or wilfully failing to state such tax separately on any evidence of sale issued or employed by the vendor, or wilfully failing or refusing to collect such tax from the purchaser, and any vendor and any officer of a corporate vendor who shall refer or cause reference to be made to this tax in any sales tag, placard or advertisement in a form oth than that required by this local law, shall, in addition to the penalties herein or elsewhere prescribed, be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or

that information has not been supplied pursuant to the provisions of this local law, shall be presumptive evidence thereof.

§ 16. Returns to be secret. 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner the receipts or other information relating to the business of a taxpayer contained in any return required under this local law. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the comptroller in an action or proceeding under the provisions of this local law, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel or other legal representatives of the city, or by the district attorney of any county within the city of New York, of the return of any taxpayer who shall bring action to set

aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the city he shall be dismissed from office and be incapable of holding any public office in this city for a period of five years thereafter.

§ 17. Disposition of revenues. All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§ 18. Application; construction. If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local law shall be construed in conformity with chapter

eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

Sec. 2. Effective date of local law. This local law shall take effect immediately.

The City of New York, Office of the City Clerk, ss:

I hereby certify that the foregoing is a true copy of a local law passed by both branches of the Municipal Assembly of The City of New York and approved by the Mayor on December 28, 1934, on file in this office.

MICHAEL J. CRUISE,
City Clerk.

APPENDIX B

Provisic of State Enabling Act

LAW OF NEW YORK

CHAPTER 873

An Act to Enable, Temporarily, Any City of the State Having a Population of One Million Inhabitants or More to Adopt and Amend Local Laws, Imposing in Any Such City Any Tax and/or Taxes Which the Legislature Has or Would Have Power and Authority to Impose to Relieve the People of Any Such City from the Hardships and Suffering Caused by Unemployment and to Limit the Application of Such Local Laws.

Became a law August 18, 1934, with the approval of the Governor. Passed, on emergency message, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending December thirty-first, nine-

teen hundred thirty-five, or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

STATE OF NEW YORK, DEPARTMENT OF STATE, ss.:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

EDWARD J. FLYNN,
Secretary of State.

APPENDIX C

1. Opinion of the Court of Appeals in *Compagnie Generale Transatlantique* Case

In the Matter of the Application of COMPAGNIE GENERALE TRANSATLANTIQUE, Respondent, against JOSEPH D. McGOLDRICK, as Comptroller of the City of New York, Appellant.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 14, 1938, in a proceeding under article 78 of the Civil Practice Act, in so far as such order annuls a determination of the Comptroller of the City of New York assessing a sales tax deficiency against the petitioner for the period from December 10, 1934, to December 31, 1935, under New York City Local Law No. 20 (published as No. 21) of 1934, as amended by Local Law No. 24 (published as No. 25) of 1934. The assessment in question was against the petitioner, as the purchaser of fuel oil from the Standard Oil Company, which maintained plants or storage tanks in the State of New Jersey. The order of the Appellate Division stated that the determination of the Comptroller with respect to deliveries originating in New Jersey should be annulled and in other respects confirmed; and also directed that the defendant return to the petitioner the amount (less a stated sum) of such deficiency sales tax which had previously been deposited, under protest, with the Comptroller by petitioner. The sum not ordered returned represented the amount of tax which was conceded to be payable on certain deliveries of fuel oil supplied from localities within the City of New York. As

to such part of the assessed tax the determination of the Comptroller was confirmed.

William C. Chanler, Corporation Counsel (Sol Charles Levine, Edmund B. Hennefeld and *Jerome R. Hellerstein* of counsel), for appellant.

Herbert K. Stockton for respondent.

H. Maurice Fridlund and *James R. Roberts for Kirlin, Campbell, Hickox, Keating & McGrann, amici curiae.*

CRANE, CH. J.:

This appeal involves the same question as that presented in its companion case, *Matter of Sears, Roebuck & Co.* v. *McGoldrick* (279 N. Y., 184). Should the principles there stated lead to a different result on the facts in this case?

The Standard Oil Company, having numerous oil tanks in New Jersey, by New York contract sold and delivered oil to the respondent's steamships at its piers in New York City. A tax upon these sales for the period from December 10, 1934 to December 31, 1935, has been set aside below, as an illegal burden upon interstate commerce. The only distinction upon the facts in this case and those in the *Sears, Roebuck & Co.* case rests in the nature of the respondent's business. The respondent buys two classes of oil for steamships—fuel oil, and Diesel fuel oil. In the briefs these are referred to as "Standard Bunker Fuel Oil" and "Standard Diesel Fuel Oil." The

storage tanks containing large quantities of these oils are at Bayonne, New Jersey.

The contract for the period in question for fuel oil is contained in a letter accepting an offer to extend a previous fuel oil contract until December 31, 1936. It states that the Standard Oil Company of New Jersey is to supply the total fuel oil requirements at New York of all the oil burning vessels of the Compagnie Generale Transatlantique during the period of the contract up to a maximum of four million barrels per year. The maximum price is fixed at $1.10 per barrel, with provision for increases. The contract for the Diesel fuel was also made at New York for a period up to December 31, 1935, not to exceed fifteen thousand barrels in any one month, and up to, but not exceeding one hundred thousand barrels during the term of one year. Delivery shall be made by barge provided by the seller to the buyer's vessel at dock within the harbor limits at New York, or to the buyer's vessel alongside dock of seller at New York. The price varies according to the place of delivery.

These two companies have been doing business for many years, and it was well understood that the oil of the Standard Oil Company of New Jersey was stored in thousands of tanks in Bayonne, New Jersey. So far as this record shows, it had no storage facilities in New York City. As the *Normandie* or the *Paris* or the *Champlain* or the *Lafayette* approached the harbor in New York, messages were sent to the Standard Oil Company's office in New York City indicating the amount of fuel that would be necessary, and with the docking of the steamer at the steamship company's pier, barges of

the oil company would soon be alongside prepared to pump the oil into the steamer's tanks. The oil was brought from New Jersey by the oil company's barges. Both the Standard Oil Company of New Jersey and the Compagnie Generale Transatlantique were doing business in the City of New York. The latter had its piers and office at the foot of Fiftieth Street, and places of business at 19 State Street and 610 Fifth Avenue, Manhattan. The offices of the Standard Oil Company of New Jersey were at 26 Broadway, New York City.

Unless there be some material difference between the sales in this case and those in the *Sears, Roebuck* case, we shall be obliged to sustain the tax. What difference do we find? In the first place, the Standard Oil Company of New Jersey maintains a large number of oil tanks in Bayonne, New Jersey and the vicinity. The steamship company knew that the nature of the business required oil to be stored in large quantities, and that the oil company had such a plant, and delivered its oil by drawing it off from these tanks into ships at Bayonne, or else into barges, to be carried to vessels at the Port of New York. While the purchase or the contract of sale was made in New York, it was with a view of getting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. The product in New Jersey, kept there in tanks, was the thing bargained for. So far as the record in this case goes, the contract centers around the purchase of the New Jersey oil of the kind and quantity specified. The delivery at the Port of New York was made necessary because of the draft of the steamers. The cost of transportation from Bayonne to the Port of New York increased the price.

Appendix C

In the *Sears, Roebuck* case the purchaser bought an article in New York according to sample. As long as he got what he ordered, it was indifferent to him where it came from. The merchandise was very largely stock goods and kept for the convenience of the seller at various depots throughout the State. The ease with which the tax could be evaded by such class of merchandise being stored without the State and sold in New York City by sample was a matter worthy of consideration, as bearing upon competition with New York goods.

Here, on the other hand, there is a special product of the Standard Oil Company of New Jersey which has to be kept in great receptacles built for the purpose which we can treat by analogy as a manufacturing plant. It is the articles of this plant in New Jersey which the purchaser seeks. At the office of the seller in New York it bargains for this oil to be put in its ships. We think, under the principles stated in the *Sears, Roebuck* case and the authorities there cited, that this is a contract for interstate shipments, and that the tax upon such a sale is a direct tax upon interstate commerce.

The order should be affirmed with costs.

FINCH, J. (Dissenting). The contract involved in the case at bar admittedly was made in New York for delivery in New York of a standard kind of oil procurable in the open market in New York or elsewhere, at an open market price. While customarily coming from New Jersey, it is admitted that in some instances the seller has resold oil which, pursuant to its rights under the contract, it had purchased in New York. When sold and delivered in this State, the fact that it may be used thereafter in foreign

commerce does not prevent it from being taxable as a sale here (*Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249). In addition, since no burden is laid on interstate commerce as such, and no other or different burden than if deliveries had been made by intrastate transportation in New York, the tax is a non-discriminatory one and cannot in any view constitute an undue burden on interstate commerce (*Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169).

The order appealed from should be reversed and the determination of the Comptroller reinstated.

LEHMAN, O'BRIEN, HUBBS, LOUGHRAN and RIPPEY, JJ., concur with CRANE, Ch. J.; FINCH, J., dissents in opinion.

Order affirmed.

2. Opinion of Appellate Division in *Compagnie Generale Transatlantique* Case

In the Matter of the Application of COMPAGNIE GENERALE TRANSATLANTIQUE, Petitioner, for an Order against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Respondent.

CERTIORARI REVIEW under article 78 of the Civil Practice Act pursuant to order granted out of the New York Special Term of the Supreme Court on the 29th day of December, 1937, and directed to Frank J. Taylor (now Joseph D. McGoldrick), as comptroller of the city of New York, commanding him to certify and return to the Appellate Division, First Department, all and singular his proceedings had and determinations made in assessing

a tax against the petitioner, pursuant to Local Law No. 20 (published as No. 21) of the New York City Local Laws of 1934, as amended by Local Law No. 24 (published as No. 25) of the New York City Local Laws of 1934, known as the New York City Retail Sales Tax Law, and pursuant to Local Law No. 25 (published as No. 26) of the New York City Local Laws of 1934, as amended by Local Law No. 13 of the New York City Local Laws of 1935, known as the New York City Personal Property Tax Law.

The assessment and determination made under the New York City Personal Property Tax Law was brought into the proceedings pursuant to stipulation of the parties.

Herbert K. Stockton of counsel [*Bernard D. Atwood* with him on the brief; *Haight, Griffin, Deming & Gardner,* attorneys], for the petitioner.

Robert Granville Burke of counsel [*Oscar S. Cox, Frank J. Derrick* and *Sol Charles Levine* with him on the brief; *William C. Chanler, Corporation Counsel,* attorney], for the respondent.

H. Maurice Fridlund of counsel [*Cletus Keating* and *James R. Roberts* with him on the brief; *Kirlin, Campbell, Hickox, Keating & McGrann,* attorneys], as *amici curiæ.*

George deForest Lord of counsel [*Woodson D. Scott* with him on the brief; *Lord, Day & Lord,* attorneys], for the Cunard White Star, Limited, *amicus curiæ.*

Harold L. Warner of counsel [*George D. Yeomans,* attorney], for the Williamsburgh Power Plant Corporation, *amicus curiæ.*

O'Malley, J. This proceeding to review a determination of the comptroller of the city of New York, assessing a deficiency tax against the petitioner in the sum of

$26,955.70, presents generally the questions, (1) whether sales to the petitioner by the Standard Oil Company of New Jersey of certain bunker fuel and Diesel oil were taxable under Local Law No. 20 of 1934 (New York City Sales Tax Law); and if not, (2) whether they were taxable under the provisions of Local Law No. 25 of 1934 (New York City Personal Property Tax Law).

The petitioner, more commonly known as the French Line, is a French corporation, engaged in the transportation of passengers and freight between the United States and foreign countries. It is authorized to do business in this State, and maintains in New York city a general agency for the United States and Canada for the sale of steamship tickets, the soliciting of freight, the operation of its piers, and the purchasing of supplies for its vessels.

The Standard Oil Company of New Jersey is a Delaware corporation. It, too, has offices in New York. Part of its business is the sale of bunker fuel and Diesel fuel oil. It has no storage tanks or other supplies located in New York city. It maintains at Bayonne, N. J., a large storage, refining and shipping plant. Another plant is at Bayway, N. J.

Bonded Standard bunker "C" fuel oil is refined oil stored in the tanks of the Standard Oil Company, free from the payment of any import duty to the United States, at all times under the supervision of the customs service. A bond to insure payment to the United States of any import duty which would become due if the oil should be used for domestic purposes is required. When delivered to a foreign steamship, a release from the bond is granted.

Appendix C

"Drawback" oil is oil imported from South America and refined at Bayonne or Bayway, N. J., at the plants of the Standard Oil. An import duty is paid thereon, but upon exportation or delivery to foreign steamships, a refund of such duties is made. Save for a few deliveries originating at Staten Island, all deliveries were of oil of these types.

For many years prior to the enactment of the local laws in question, the Standard Oil had agreements with the petitioner for the furnishing of this fuel and Diesel oil to the vessels of the petitioner at their piers in New York city. As certain vessels with a limited draft could dock at Bayonne and there receive the oil, there was a five-cent differential placed on oil delivered in Bayonne or in New York city. It does not appear, however, that any deliveries were ever made to the petitioner in New Jersey.

As refueling of the petitioner's vessels in this city was required to be very expeditious, because of a quick "turn-around," the following procedure was adopted between the petitioner and the Standard Oil. The incoming liner, about forty-eight hours before arrival at the Port of New York, would radio an estimate of the bunker requirements to the petitioner's New York office. Thereupon the petitioner's employee would telephone the Standard Oil shipping clerk in New York city and place the order. It was so timed that the barges on which the oil was transported from New Jersey to the vessel would arrive ten or fifteen minutes after the vessel had completed docking. Thereupon the oil was pumped directly from the barges into the fuel bunkers.

While the contracts between these parties did not specifically require that this oil should come from New Jersey or any other specified locality, the fact is, as already noted, that the only sources of supply for oil of this character in this vicinity controlled by the Standard Oil were its plants in Bayonne and Bayway, N. J. Furthermore, the petitioner knew that this would be the immediate source of the fuel oil and, of course, the petitioner had the right, specifically granted in the contracts, to fuel its vessels at Bayonne, were they of sufficiently shallow draught. Moreover, the contracts required delivery to the steamer.

Certain small deliveries in emergency periods were made by oil borrowed by the Standard from competitors, and two of such deliveries had their origin at Staten Island in New York city, where the competing firm had its oil.

We are of opinion that, with respect at least to the New Jersey originating deliveries mentioned, there could be assessed and collected no tax under the City Sales Tax Law.

As to those shipments originating in New Jersey, they were interstate transactions, and hence not taxable by the State of New York. The city, deriving its power from the State, could have no greater right. Delivery from New Jersey was the "normal, contemplated and followed course" of dealing. (*Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 113.)

There was here no ending of the interstate transaction, nor had the oil come to rest in this jurisdiction so as to acquire a situs herein. There was no break in transit.

Under such circumstances there was an entire and exclusive interstate transaction. (*Minnesota* v. *Blasius*, 290 U. S. 1.)

The oil was immediately, as already stated, pumped from the lighters into the bunkers of the ship and thereupon became a part of the ship. The vessels themselves had no taxable situs here. (*Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; *Ayer & Lord Co.* v. *Kentucky*, 202 id. 409; *People ex rel. Astor Trust Co.* v. *State Tax Commission*, 174 App. Div. 320, 324.)

The situation here is, we think, factually dissimilar from *Wiloil Corporation* v. *Pennsylvania* (294 U. S. 169); *Banker Brothers* v. *Pennsylvania* (222 id. 210), and *Matter of McNeel Marble Co.* v. *Graves* (247 App. Div. 242). In the *Wiloil* case the Supreme Court of the United States held itself bound by the finding of the Pennsylvania courts that the goods had come to rest in Pennsylvania before the sale to a resident of Pennsylvania. Here, the shipments in question never came to rest within this jurisdiction. In the *Banker Brothers* case the article which was the subject of sale had likewise been held to have come to rest in the taxing jurisdiction. This also was true in the *McNeel Marble* case. These particular shipments seem, therefore, to fall within the purview of *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208; certiorari denied, 303 U. S.—), where it was held that the city sales tax had no application.

As to the emergency deliveries originating at Staten Island, the petitioner concedes for the purpose of this case only that the sales tax of $292.83 should apply. Because of this concession the determination under review with respect to such amount of tax will be confirmed. By such

confirmation, however, we are expressing no opinion respecting the taxability of such sales.

Finding, as we do, that the New Jersey shipments never came to rest and acquired no situs in this State and that the interstate or foreign commerce was uninterrupted and continuous, the New York City Personal Property Tax Law also did not apply. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582; *Minnesota* v. *Blasius*, *supra*, p. 10.)

As to the alleged invalidity of this law and the other objections raised thereto by the petitioner, we do not in this decision consider or decide. The city states in its brief that it does not "press its right in this proceeding" in this respect.

It follows, therefore, that the determination of the comptroller with respect to the deliveries originating in New Jersey should be annulled; otherwise, confirmed as herein indicated.

MARTIN, P.J., GLENNON, UNTERMYER and DORE, JJ., concur.

Determination of the respondent with respect to the deliveries originating in New Jersey unanimously annulled; otherwise, confirmed as indicated in opinion. Settle order on notice.

3. Memorandum Opinion of Court of Appeals in *Felt & Tarrant* Case

In the Matter of FELT & TARRANT MFG. CO., Respondent, against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Appellant.

Appendix C

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 27, 1938, which annulled a determination of the Comptroller of the City of New York assessing against petitioner a sales tax pursuant to Local Law No. 20 of 1934 (published as No. 21), as amended by Local Law No. 24 (published as No. 25).

William C. Chanler, Corporation Counsel (*Milton Sandberg* and *Bernard H. Sherris* of counsel) for appellant.

Newton K. Fox, for respondent.

Order affirmed with costs, upon the authority of *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208). No opinion.

CONCUR: CRANE CH.J., LEHMAN, O'BRIEN, HUBBS, LOUGHRAN, FINCH and RIPPEY, JJ.

4. Opinion of Court of Appeals in *Sears, Roebuck* Case

In the Matter of SEARS, ROEBUCK & Co., Appellant, against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Respondent.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 29, 1938, which confirmed a determination of the Comptroller of the City of New York assessing a deficiency sales tax, with interest and penalties, against the petitioner for the period from December 10, 1934, to December 31, 1935, under Local Law No. 20 of 1934

(published as No. 21), as amended by Local Law No. 24 (published as No. 25) for the City of New York.

Robert D. Steefel, Sol M. Stroock, Peter I. B. Lavan and *Bernard E. Brandes* for appellant.

William C. Chanler, Corporation Counsel (Sol Charles Levine, Edmund B. Hennefeld, Jerome R. Hellerstein and *Milton Sandberg* of counsel), for respondent.

CRANE, CH. J.

By Local Law No. 24 (published as No. 25) of 1934, enacted pursuant to authorization granted by the State Legislature (Laws of 1934, ch. 873), the city of New York imposes a tax of two percent upon receipts from every sale of tangible personal property sold within the city. The tax must be paid by the purchaser to the vendor, who is required to keep records and make a return to the Comptroller of his receipts and of the tax payable thereon. A sale is defined as any transfer of title or possession, or both, for a consideration. A sale at retail is a sale for any purpose other than for resale. Although ordinarily the tax is collected by the vendor from the purchaser, the Comptroller may collect the tax directly from the purchaser. Where the vendor fails to collect the tax the purchaser is required to file a return and pay the tax directly to the Comptroller.

Sears, Roebuck & Co. has been required to pay a tax for the years 1934 and 1935 upon sales made at its stores in New York City, the goods or merchandise being sent from its warehouses or plants in other States. Payment has been resisted under the plea that such a tax is uncon-

stitutional, as a burden upon interstate commerce. This tax has been sustained by the Appellate Division.

The petitioner conducts and operates nine retail stores within the city of New York. The principal office of the petitioner, which is a New York corporation, is at Chicago, Illinois. It has no factory or warehouse in the city of New York except a piano factory and except one warehouse in the borough of Brooklyn, which stores ready to wear suits, dresses, coats and other articles of clothing, piece goods, notions and other light merchandise. Sears, Roebuck & Co. maintains a control store at Philadelphia, Pennsylvania, which is a distributing plant for all of the New York stores and other stores in various parts of the east of the United States, and the executives at this control store have charge of and supervision over the New York stores. The company also maintains a factory at Port Newark, New Jersey, where there are manufactured and assembled bulky articles, such as mill work, roofer materials, heating equipment and the like. The articles involved on this review are described as "ship direct orders." Certain articles which are large and bulky, or which must be assembled and put together before they are ready for delivery to the customer, are not kept in stock in the company's New York stores, but are kept either at the control store in Philadelphia, or are kept or manufactured upon order, at the factory at Port Newark, New Jersey. At Boston, Massachusetts, there is the Boston mail order control store.

The regional auditor gave the following testimony:

"Q. When you make a sale or take an order for this type of merchandise do you have samples at

your store? A. There are samples on display in the store and that is all that is in the store; because of the type of merchandise, it is entirely too bulky to carry it in the stores."

The practice, so the petitioner stated in its petition for review, is for a customer to come to one of the retail stores in New York City and order the merchandise in question. He is informed by the salesman that the merchandise is not kept in stock, but must be ordered from either Philadelphia or Port Newark, as the case may be. His order is taken and if it is a cash transaction, he pays his money, or, if it is a credit transaction, his credit is checked. A sales slip is made out, which states that the merchandise is to be shipped either from the Philadelphia control store or Port Newark direct to the customer at his home within the city of New York. A duplicate of the sales slip is sent to Port Newark or Philadelphia. The order is filled and is shipped by United States mail or by common carrier. The sample of sales slip, taxpayer's Exhibit No. 6, for horsehide coat, size 48, simply has written diagonally across the bottom in lead pencil, "Ship from Phila control Stores." These sales slips are not signed by the purchaser.

Approximately eighty-five per cent of the sales at New York city stores are filled from a stock of merchandise kept in New York City. As to the remaining fifteen per cent, the goods are standard merchandise regularly carried in stock by the company as a retail dealer, none of which is manufactured to order, with the exception of mill work. At the nine retail stores during the period in question the appellant sold $2,750,857.99 worth of goods.

Of these sales, $2,228,113.59 represented orders filled from stock kept in New York city stores or in the warehouse maintained in Brooklyn. The balance of $462,744.40 consisted of sales filled from stock held in warehouses maintained in Philadelphia, Port Newark or Boston.

The two percent tax on the sales of merchandise in the stores in New York City has been paid. This appeal involves solely the tax on the "shipped direct orders." All parties to the controversy concede that the contracts of sale or the sales were made in New York City. The delivery was made from the company's warehouse or control stores according to shipping directions directly to the purchaser's home.

When the purchaser entered one of the defendant's stores and made a contract to buy certain merchandise, according to the sample displayed, his purpose and object were to procure the article, irrespective of the place from which it was delivered. It made no difference to him whether it came from Philadelphia, Port Newark or Boston, as long as he got it on time and in good condition. The delivery from the warehouses of the appellant outside the State was a matter of convenience or economy in the methods of conducting the appellant's business. It cannot be said that the shipments out of the State were one of the important features of the contract. It was incidental to the contract, the obligation of the defendant being to deliver the article purchased. From where it should come was a matter of its choice.

On these facts, has interstate commerce been burdened or interfered with in such a way as to make this city tax upon the proceeds of these "shipped direct orders" unconstitutional? In the first place, Sears, Roebuck & Co.

paid no more tax on these articles which it had delivered from its stores in Philadelphia or Port Newark or Boston than it paid on the goods sold and delivered from its nine stores in New York City. It paid no more tax than a seller would have paid or, to be more exact, a purchaser would have paid, if the goods had been purchased and delivered in New York City from any other vendor. There was here no discrimination against the interstate commerce or the shipment of goods from out the State. Neither could there possibly be any double taxation involved. The sale was complete in New York city; the price was to be paid in New York city; in every respect it was a New York State contract, governed by the laws of this State. The delivery of standard stock goods for the convenience of the seller was made from warehouses or storeplaces outside of the State. Under such circumstances, to permit Sears, Roebuck & Co. to evade this tax would really be a discrimination against people doing business within the city of New York with storehouses or mills there. Besides, if such sales were to go untaxed, a door would be open for an evasion, unfair indeed to those who did not care to resort to such methods. Merchandise could be stored or kept outside the State and sold by sample within the State, without paying a tax. Not every merchant can afford such storehouses. No principle of interstate commerce forces us to such a conclusion. "Even interstate business must pay its way." (*Postal-Telegraph Cable Co.* v. *City of Richmond*, 249 U. S. 252, 259).

The counsel have relied upon *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208). The sales there were made and consummated in Ohio where the company

approved, accepted and executed the orders or sales. To the same effect was *Matter of West Publishing Co.* v. *Taylor* (276 N. Y. 535). The reasons and principles here expressed find their source, or, rather, their support, in such cases as *Adams Manufacturing Co.* v. *Storen* (304 U. S. 307); *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.* (303 U. S. 604); *Western Live Stock* v. *Bureau of Revenue* (303 U. S. 250); *Henneford* v. *Mason Co.* (300 U. S. 577); *Wiloil Corp.* v. *Pennsylvania* (294 U. S. 169); *Monamotor Oil Co.* v. *Johnson* (292 U. S. 86); *Banker Brothers Co.* v. *Commonwealth of Pennsylvania* (222 U. S. 210).

The order should be affirmed, with costs.

LEHMAN, O'BRIEN, HUBBS, LOUGHRAN, FINCH and RIPPEY, JJ., concur.

Order affirmed.

DEC 27 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 44. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,
against
COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

December 26, 1939.

WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
Counsel for Petitioner,
Municipal Building,
New York, N. Y.

WILLIAM C. CHANLER,
SOL CHARLES LEVINE,
JEROME R. HELLERSTEIN,
of Counsel.

452 Appeal Printing Co., Inc., 130 Cedar St., New York - WOrth 2-3242

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Supreme Court of the United States

No. 44. October Term, 1939.

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

A writ of certiorari was granted by this Court on June 5, 1939, to review a final order of the Court of Appeals of the State of New York, affirming (one Judge dissenting) a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, nullifying the petitioner's determination that certain sales taxes were due and owing to him as Comptroller of the City of New York. The amount of the tax in controversy is $26,662.87, with interest, for the period from December 10, 1934 to December 31, 1935 (R. 309).

The sole ground for the nullification of the petitioner's determination by the order under review was that the imposition on the respondent of the duty to pay the sales taxes in question on its purchases of fuel oil supplied from storage tanks located in New Jersey, was violative of the Commerce Clause (Art. 1, Sec. 8, Cl. 3).

Opinions Below.

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 294), before which the proceedings to review the Comptroller's determination were heard in the first instance (New York Civil Practice Act, Art. 78), is reported in 254 App. Div. 237 (1938).

The opinion of the Court of Appeals (R. 302) is reported in 279 N. Y. 192, 18 N. E. (2d) 28 (1938). The supplemental opinion on motion for reargument or amendment of the remittitur, wherein the Court of Appeals declared that the decision below was affirmed "upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (Article 1, Section 8, clause 3) of the Constitution of the United States." (R. 307), is reported in 280 N. Y. 691, 21 N. E. (2d) 199 (1939).

Jurisdiction.

The writ of certiorari was issued pursuant to the power conferred on this Court by U. S. Code, Title 28, Sec. 344, subsec. b. The decision below having sustained the claimed federal right and the federal question being the sole ground of decision (R. 307), a case was made out within the cited statute for this Court to issue the writ.

Statement of the Case.

The respondent, to whom we shall refer as the "taxpayer", is generally known as the French Line, and operates a fleet of ocean liners between New York City and European ports. It is a French corporation (R. 64), authorized to do business in the State of New York (R. 65, 66), and maintains offices in New York City for the

transaction of its affairs, such as the booking of passengers and freight on its vessels, and for the housing of its executive, accounting and publicity staffs (R. 4, 67). It has also leased a pier on the North River, where its vessels dock (R. 31).

The New York offices handle, *inter alia*, the taxpayer's purchases of fuel oil for the eastbound voyages of its ships (R. 25). This oil is generally obtained from the Standard Oil Company of New Jersey through contracts evidenced by a series of letters (Taxpayer's Exhibits 1-13, R. 228-240) and a Diesel Fuel Oil Contract (Taxpayer's Exhibit 14, R. 241-242). The contracts cover requirements for a year at a time, up to a prescribed maximum per year (R. 228, 229, 235, 236). All the contracts were negotiated and signed in the City of New York (R. 72, 73, 75, 96, 102, 103).

A fairly uniform practice seems to have been adhered to by the taxpayer in taking title to and possession of particular purchases of oil. When the taxpayer's New York City office gets word as to the fuel requirements for its eastern voyage of a particular liner which has just docked, the office of Standard Oil Company of New Jersey, at 26 Broadway, New York City, is called on the telephone, and the order is placed (R. 127, 129, 130, 174). There is no occasion to mention price, for that has already been agreed upon in the contracts previously negotiated and signed in New York City (R. 72, 73, 76; Taxpayer's Exhibits 1-13, R. 228-240). Nor is the source of the shipment mentioned (R. 130). All that the taxpayer's employee tells the oil company's employee over the telephone is the quantity of oil to be delivered, the time and the place (R. 129, 130).

The New York City office of the Standard Oil Company thereupon communicates with the storage plant at Bay-

onne or Bayway, New Jersey, or some other available source which it selects (R. 121, 133, 134-136, 215-218). The oil is then loaded on the Standard Oil Company's barges, which proceed to the taxpayer's pier at 50th Street and North River, New York City, the oil being pumped on arrival from the barges into the bunkers of the respective ships as they remain moored to the pier (R. 104, 121-122, 137-145, 199-200). The period that the steamers remain at dock varies from one to five days (R. 120). The steamers bunker on both sides of the ocean approximately the requirements of the crossing (R. 120-121).

It is undisputed that all purchases of oil which the petitioner asserted the right to subject to sales taxes, were filled by deliveries to the taxpayer's ships at its New York City piers (R. 83, 84). It is likewise undisputed that the invoices for oil delivered are sent by the Standard Oil Company of New Jersey from its office at 26 Broadway, New York City, to the taxpayer at its office at 610 Fifth Avenue, New York City (Taxpayer's Exhibits 32A, 33A, 34A, R. 278, 280, 282); and that these invoices bear at the top the words "Send remittances to Room 2500, 30 Rockefeller Plaza, N. Y. City." (*Ibid.*)

The contracts between the parties do not specify the source from which the oil is to be obtained (Taxpayer's Exhibits 1-14, R. 228-242). This is a matter of complete indifference to the taxpayer, since all the oil is sold "delivered" (Taxpayer's Exhibits 1, 3, 5, 6, 7, 10 and 14, R. 115, 228-230, 231, 232, 233, 236, 240), and since the source of the oil has no bearing on the use to which it is to be put (R. 115, 116, 186). The oil in question has no special quality not shared by the oils of other oil companies (R. 152, 153, 213-214). Any bunker "C" fuel becomes "Standard" oil merely if Standard Oil Company buys and sells it (R. 213-214). The contracts expressly give the taxpayer the right to buy the oil in the open

market from Standard Oil Company's competitors, in the event its price exceeds that quoted by the competitors by fifteen cents a barrel (Taxpayer's Exhibits 5, 7, 10, R. 232, 233, 237). Oil fully meeting the specifications of the contracts (R. 170, 214, 216), obtained by Standard Oil Company from its competitors, was actually furnished to the taxpayer during the period in controversy (R. 153, 213-214, 216-217). Occasionally, oil to fill the contracts was obtained by the vendor from Gulf Oil Company, whose storage tanks are located in the City of New York (R. 150, 158, 217). As to these purchases, the taxpayer conceded its sales tax liability.[1]

All the bunker fuel oil delivered from the Standard Oil Company's own tanks was drawn from its stocks at Bayonne or Bayway, New Jersey (Taxpayer's Exhibit 27, R. 257). The oil company does not maintain storage tanks for such oil in the State of New York (R. 83, 104, 106, 192-193, 196).

The New York City Sales Tax Law.

This tax was first enacted on December 10, 1934, as part of a comprehensive program of tax measures by which New York City was to finance its pressing emergency relief needs on a pay-as-you-go basis.[2] As appears from the Appendix of Statutes to be submitted on the

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[1] The original assessment appealed from was in the sum of $26,955.70 (R. 6). The taxpayer conceded in the Courts below that it was liable for a tax of $292.83 upon the oil obtained by Standard Oil Company from Gulf Oil Company at Staten Island, New York City (See order of Appellate Division [R. 293], and opinion of that Court [R. 296]). For that reason the judgment below directs a refund of $26,662.87 instead of $26,955.70, with interest and costs (R. 309).

[2] Certain of these measures were before this Court in *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938), where they were sustained as against asserted contravention of the Fourteenth Amendment.

argument, it was enacted pursuant to emergency enabling legislation passed by the State legislature (Laws of 1933, ch. 815 [Appendix C], Laws of 1934, ch. 873 [Appendix B] and amendments and renewals thereof). The enabling act declared that an emergency existed requiring the imposition of taxes "to relieve the people • • • from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare." It authorized the City of New York to "adopt and amend local laws imposing in any such city any tax which the legislature has or would have power and authority to impose." The revenues from the taxes were required to be used exclusively for emergency unemployment relief.

The tax imposed by Local Law No. 20 of 1934, as amended (printed as Appendix A in the Appendix of Statutes), is limited to purchases for consumption. Purchases for resale are exempt under a definition of retail sale having that express purpose (Sec. 1g). A purchaser who has paid the tax and later resold may, upon filing a proper certificate of resale, obtain a refund of the taxes paid (Sec. 14).[1]

The sales tax applies with respect to the following kinds of purchaser-consumers (Secs. 2a, b, c and d):

1) Consumers of goods,[2] excluding food and drugs on prescription.

2) Consumers of utility services,[3] *i. e.*, gas, electricity, telephone, etc.

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[1] Under the New York City emergency relief business tax law, on the other hand, wholesale as well as retail vendors are taxed. Local Law No. 9 of 1934 and its successors.

[2] The *vendors* of goods, on the other hand, are taxed under the New York City emergency relief business tax law. Local Law No. 9 of 1934, and its successors.

[3] The *vendors* of utility services are taxed under the New York City emergency relief utility tax law. Local Law No. 19 of 1933, and its successors.

3) Customers in restaurants and cafes where the meals are over $1.[1]

The tax is imposed not on the seller[2] but on the buyer. The statute makes this abundantly clear and the Courts have so held (*Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113, 124 [1937]; *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293, 297 [1938]).

The statute provides that the tax is payable "by the purchaser to the vendor, for and on account of the city of New York" (Sec. 2). The vendor is liable for collection, filing of returns and payment over to the City and has "the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser as if the tax were a part of the purchase price of the property or service" (Sec. 2). The vendor is required to state and charge the tax separately from the sales price (Sec. 2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties (Sec. 15). It is also a crime for the vendor to advertise that he is absorbing the tax (Secs. 2, 15). Where the vendor fails to collect the tax, the purchaser-consumer is required within fifteen days to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (Sec. 2). In the case at bar, the Comptroller has actually assessed the tax directly against the purchaser.

Specification of Errors to be Urged.

We contend that the Court of Appeals erred:

(a) In holding that the New York City sales tax as applied to the respondent's purchases con-

[1] The *restaurateurs* are liable for a business tax.

[2] No license is required of the seller, or of anyone else for that matter, as a condition of making the sale.

stituted an unconstitutional burden on interstate commerce.

(b) In holding that the purchases which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of *Wiloil Corporation* v. *Pennsylvania* (294 U. S. 169 [1935]).

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Argument.

In our brief in the companion case of *McGoldrick* v. *Berwind-White Coal Mining Company*, copies of which have been furnished to counsel for the taxpayer in the case at bar, we discussed at length the general principles underlying the Commerce Clause and their application to the decided cases and to the taxing statute at bar. No useful purpose would be served by repeating that discussion here. Accordingly, we respectfully refer the Court to our brief in that case for a statement of our position.

I.

It is apparent from a consideration of the facts at bar that the burden of the tax is "precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation." (*Wiloil Corporation* v. *Pennsylvania*).

In our brief in the *Berwind-White* case, we sought to show that the ultimate test in determining the constitutionality of a State tax, under the Commerce Clause, is whether or not its effect is to bring about inequality

between interstate and local commerce. If the tax is discriminatory or subjects interstate commerce to a greater burden, or to the danger of a greater burden, than would result if no interstate commerce were involved, it is invalid (Br., p. 26, *et seq.*; p. 41, *et seq.*). Otherwise it must be sustained. We also pointed out that this is a question of fact (Br., p. 14, *et seq.*).

Let us consider for a moment the practical effect of the tax at bar upon interstate commerce. In this case the tax was levied directly against the purchaser; the seller is not involved at all. As is established by the record, the contracts in this case do not specify that the oil shall be delivered from New Jersey (see pp. 4-5, *supra*). They merely specify a certain standard and quality of oil (Taxpayer's Exhibits 1-14, R. 228-242, 213-214). As further appears from the record, the seller can, and in fact did, comply with these specifications to the satisfaction of the purchaser by delivering oil purchased by it in the open market (R. 153, 170, 213-214, 216-217). A part of the oil delivered to this purchaser by this seller under these contracts was delivered from the storage tanks of the Gulf Oil Company located at Staten Island within the City of New York (R. 150, 158, 217). *And as to these purchases, the French Line concedes its tax liability* (see p. 5, *supra*).

If there were no sales tax at all, the question of whether or not this purchaser would buy its oil from New Jersey or Staten Island would depend solely upon such considerations as the quality and price of the oil and the ease of obtaining delivery.

If the tax as assessed should be held valid as to deliveries from New Jersey as well as to deliveries from Staten Island, precisely the same situation would prevail. The purchaser would not in any way be deterred from

purchasing New Jersey oil as against Staten Island oil on account of the tax, or *vice versa*.

It is only if this tax should be held invalid as to purchases from New Jersey that it could have any effect upon commerce: It would then produce an almost prohibitive discrimination against local sellers such as the Gulf Oil Company, whose tanks are located at Staten Island. For obviously no person who purchases oil in quantity would willingly purchase it from Staten Island and pay a sales tax if he can purchase the same oil from New Jersey and avoid the sales tax.

In other words, it is apparent from the facts presented in this case that equality between interstate and intrastate commerce can be obtained only by sustaining the tax at bar.

> "The act lays no burden on interstate commerce as such and if any can be said to result from the imposition, it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources." (*Wiloil Corporation v. Pennsylvania*, 294 U. S. 169, 175 [1935].)

Accord: Graybar Electric Co. v. *Curry*, 308 U. S. (Nov. 6, 1939), affirming, Ala. , 189 So. 186 (1939).

II.

It is apparent from an application of the various tests laid down by the Court that the tax at bar does not violate the Commerce Clause.

Because the tax is imposed upon the transfer of goods for use or consumption, it is levied upon a local event which can take place in only a single State; for that reason, no other State can impose the tax (*Berwind-White* Br., pp. 42-43).

Multiple taxation would not arise by reason of the imposition of taxes on the seller upon the same transaction, for similar taxes could be imposed on local sellers, with the result that interstate and intrastate commerce would be and are on a level of equality (*idem*, pp. 47-50).

Moreover, there is no danger of multiple taxation, since the tax at bar is imposed not upon sellers but upon buyers, who cannot be taxed in any other State (*idem*, pp. 43-45). Obviously, the French Line cannot be subjected to any tax upon its purchases by the State of New Jersey, from which the Standard Oil Company generally delivers the oil. Nor can it be subjected to tax upon the purchase, or upon the oil, by any other jurisdiction, since the oil is consumed as fuel by its vessels in crossing the ocean.

Our general position becomes particularly striking in the case at bar, where the tax was assessed directly against the purchaser. The City of New York has imposed a tax upon all persons who come into its market to purchase property at retail and who obtain possession of that property within the City. It is in effect a shoppers' tax imposed upon consumers. This respondent has come into the markets of New York to buy supplies which it consumes in its business. How can interstate commerce be burdened by a non-discriminatory sales tax imposed on all purchasers in the market, merely because the particular goods are refined or stored in another State? Surely, this purchaser cannot escape the payment of taxes imposed upon all other purchasers, merely because the seller delivers the oil from a refinery or warehouse in New Jersey.

III.

The facts at bar are indistinguishable from those in *Southern Pacific Co.* v. *Gallagher*, where the tax was recently sustained by this Court.

The factual identity with the California so-called "use taxes" is particularly evident in this case. In *Southern Pacific Co.* v. *Gallagher* (306 U. S. 167 [1939]), the railroad company bought supplies which were shipped to it across State lines and immediately used the supplies in interstate transportation. Not only are the taxes in the *Southern Pacific* case and the case at bar identical (see *Berwind-White* Br., pp. 19-23), but in addition the position and business of the taxpayers in the two cases are so similar in every detail as to make inconsistent results entirely out of the question, if the problem is to be approached from a factual and a practical point of view.

Of course, the fact that the oil is consumed by the taxpayer in interstate commerce has no bearing upon the City's power to tax local sales (*Southern Pacific Co.* v. *Gallagher, supra; Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U. S. 182 [1939]; *Eastern Air Transport* v. *Tax Comm.*, 285 U. S. 147 [1932]; *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249 [1933]; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249 [1933]).

Apart from the use tax cases, *supra*, in which the taxes have invariably been sustained, this is the first case in which a purchaser-consumer has complained to this Court that a retail sales tax levied upon him violated the Commerce Clause. (Compare *Eastern Air Transport* v. *Tax Comm., supra.*) We submit that this fact strongly supports our contention that the Commerce Clause does not

protect purchasers of goods for consumption. Their purchasing activities are local and do not subject them to the dangers of multiple taxation which vendors doing business across State lines would risk, in the absence of the protection of the Commerce Clause.

IV.

Neither the vendor nor the purchaser of goods shipped across State lines can justly complain of the tax at bar, which places them on a level of equality with all other vendors and purchasers.

A consideration of the character of the respondents in the three companion cases and the case at bar serves to emphasize our contentions. In the three companion cases, vendors are contesting the tax. We have already demonstrated that the tax is paid and borne not by the sellers but by the buyers (see p. 7, *supra; Berwind-White* Br., p. 49). If the taxes should be upheld, the complaining respondents in those cases will be in a position to collect the amount of the assessments in dispute from their purchasers (Sec. 2, Local Law No. 20 of 1934, as amended). It is apparent, therefore, that the motive which leads the sellers to contest the tax is not the burden of their tax liability, but rather their desire to obtain a competitive advantage over merchants selling goods from local warehouses.

In the case of the French Line, on the other hand, its interest is that of obtaining goods in the New York market without paying the taxes to which all other buyers are subjected.

We believe that neither of these interests is protected and that neither of these results is required by the Com-

merce Clause. The Commerce Clause, as we have shown, does not require that merchants shipping goods from across State lines be given competitive advantages over local merchants; nor that persons who come into a local market to buy goods and there obtain possession of the goods be exempted from tax merely because the goods are shipped to them across State lines. In short, there being no discrimination against any person who comes into the New York market to buy or sell goods, and there being no danger of subjecting interstate businesses to multiple tax burdens not borne by local business, the tax at bar must be sustained.

Conclusion.

The final order and judgment should be reversed and petitioner's determination confirmed.

December 26, 1939.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
Counsel for Petitioner.

WILLIAM C. CHANLER,
SOL CHARLES LEVINE,
JEROME R. HELLERSTEIN,
of Counsel.

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(27409)

Supreme Court of the United States

October Term, 1939

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, *Petitioner*, *against* COMPAGNIE GENERALE TRANSATLANTIQUE.	No. 44
JOSEPH D. McGOLDRICK, Comptroller of the City of New York, *Petitioner*, *against* FELT & TARRANT MFG. CO.	No. 45
JOSEPH D. McGOLDRICK, Comptroller of the City of New York, *Petitioner*, *against* A. H. DuGRENIER, INC., Principal, and STEWART & McGUIRE, INC., Agent.	No. 474
JOSEPH D. McGOLDRICK, Comptroller of the City of New York, *Petitioner*, *against* BERWIND-WHITE COAL MINING COMPANY.	No. 475

APPENDIX OF STATUTES.

WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
Counsel for Petitioner,
Municipal Building,
Borough of Manhattan,
City of New York.

APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1934.

No. 24 *

A local law to amend local law number twenty of the year nineteen hundred and thirty-four to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and rendering of certain services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief.

Became a law December 28, 1934, with the approval of the Mayor. Passed on message of necessity by the local legislative body of the city of New York.

Be it enacted by the municipal assembly of the city of New York as follows:

Section 1. Local law number twenty of the local laws of the city of New York for the year nineteen hundred and thirty-four, entitled "A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief," is hereby amended so as to read as follows:

TAX ON SALES OF CERTAIN PROPERTIES AND RENDERING OF CERTAIN SERVICES IN THE CITY OF NEW YORK:

Section 1. Definitions.

2. Imposition of tax.

* Erroneously numbered "25" in the compilation published at Albany.

3. Collection of tax from purchaser.
4. Records to be kept.
5. Returns.
6. Payment of taxes.
7. Determination of tax by the comptroller.
8. Proceedings to recover tax.
9. Notices and limitations of time.
10. Refunds.
11. General powers of the comptroller.
12. Administration of oaths and compelling testimony.
13. Reference to tax.
14. Registration.
15. Penalties.
16. Returns to be secret.
17. Disposition of revenues.
18. Application; construction.

Section 1. **Definitions.** When used in this local law:

(a) The word "person" includes an individual, co-partnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

(d) The word "receipt" means the amount of the sale price of any property or the charge for any service specified in section 2 of this local law, valued in money, whether re-

ceived in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever;

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

(f) The words "tangible personal property" mean corporeal personal property;

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

(h) The word "semi-public" means those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowment and are not organized or operated for profit;

(i) The word "return" includes any amended return filed or required to be filed as herein provided;

(j) The word "comptroller" means the comptroller of the city of New York.

§ 2. **Imposition of tax.** During the period commencing on December tenth, nineteen hundred and thirty-four, and

ending on December thirty-first, nineteen hundred and thirty-five,* there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

(b) Gas, electricity, refrigeration and steam, and gas, electric, refrigeration, steam, telephone and telegraph service, for domestic or commercial use;

(c) Food, drink and entertainment in restaurants, cafes and other establishments including in the amount of such receipts any cover or minimum or other charge made to patrons where the charge to the patron is one dollar or more, in which event the tax is imposed on the full amount of the charge to each such patron;

(d) Wines and liquors and other alcoholic beverages, and drinks compounded thereof or therewith, except beer or other similar malt beverages, including sales thereof in restaurants, cafes, bars and other places for consumption on the premises:

SCHEDULE A

Cereals and cereal products;
Milk and milk products;
Meat and meat products;
Fish and fish products;
Eggs and egg products;
Vegetables and vegetable products;
Fruits, spices and salt;

* The local law has been annually renewed and extended and is still in effect.

Appendix A

Sugar and sugar products, other than candy and confectionery;

Coffee and coffee substitutes; beer or other similar malt beverages; tea, cocoa and cocoa products; other than candy and confectionery;

Water, when delivered to the consumer through mains and pipes;

Drugs and medicines sold upon a physician's prescription;

Newspapers and periodicals.

The enumeration in this schedule shall not be deemed to exclude sales of wines and liquors and other alcoholic beverages, soft drinks, and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith (other than coffee, tea and cocoa, beer and other similar malt beverages), nor any food or food products unless sold for human consumption, from the tax imposed by this local law.

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder.

Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or

in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale.

Where a purchaser has failed to pay and a vendor has failed to collect a tax upon a sale or service, as imposed by this local law, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered.

The comptroller may, wherever he deems it necessary for the proper enforcement of this local law, provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed, at such times as returns are required to be filed and payment over made by vendors.

The tax imposed by this local law shall be paid upon all sales made and services rendered on and after December tenth, nineteen hundred and thirty-four, although made or rendered under a contract dated prior to December tenth, nineteen hundred and thirty-four. Where a service is billed on either a monthly or other term basis, the bill for such month or other terms shall be a receipt subject to the tax herein imposed, provided that where such bill includes a period prior to December tenth, nineteen hundred and thirty-four, or subsequent to December thirty-first, nineteen hundred and thirty-five,* such bill shall be equitably apportioned. The comptroller may provide by regulation that the tax upon receipts from sales on the installment plan may be

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* See footnote, *ante*, p. 4.

paid on the amount of each installment and upon the date when such installment is due. He shall provide by regulation for the exclusion of amounts representing sales where the contract of sale has been cancelled and/or the property returned and/or the receipt has been ascertained to be worthless, or, in case the tax has been paid upon such receipts, for a credit and/or a refund of the amount of the tax upon such receipts, upon application therefor as provided in section 10.

For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property and services mentioned in this section are subject to the tax until the contrary is established, and the burden of proving that a receipt is not taxable hereunder shall be upon the vendor or the purchaser, unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate to the effect that the property or service was purchased for resale.

No person engaged in the business of selling property or services the receipts from which are subject to tax under this local law shall advertise or hold out to the public in any manner directly or indirectly that the tax imposed by this local law is not considered as an element in the price to the purchaser.

§ 3. **Collection of tax from purchaser.** The comptroller shall by regulation prescribe a method or methods and/or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this local law so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a ven-

dor shall, as far as practicable, equal two percentum of the total receipts from the sales and services of such vendor upon which a tax is imposed by this local law. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

§ 4. **Records to be kept.** Every vendor shall keep records of receipts and of the tax payable thereon, in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 5. **Returns.** Every vendor shall file with the comptroller a return of his receipts and of the taxes payable thereon for the periods ending February twenty-eighth, May thirty-first, August thirty-first and December thirty-first, nineteen hundred and thirty-five. Such returns shall be filed within thirty days from the expiration of the periods ending February twenty-eighth and May thirty-first and within fifteen days from the expiration of the periods ending August thirty-first and December thirty-first. The comptroller may permit returns to be made by other periods so as to include all receipts during the period from December tenth, nineteen hundred and thirty-four, to December thirty-first, nineteen hundred and thirty-five,* inclusive. If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of

* See footnote, *ante*, p. 4.

receipts to be made for other than the aforesaid periods and upon such dates as he may specify.

The form of returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this local law. The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice. [*Amended by Local Law No. 23 of 1935.*]

§ 6. **Payment of taxes.** At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. All taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to secure the payment of any tax and/or penalties due or which may become due from such vendor. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon such sale, the

surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities.

§ 7. **Determination of tax by comptroller.** If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient the comptroller shall determine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The comptroller shall give notice of such determination to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser against whom it is assessed shall be entitled to and within thirty days after the giving of notice of such determination apply to the comptroller for a hearing, or shall cause the same to be reviewed by certiorari, or unless the comptroller of his own motion shall reduce the same. If no opportunity for a hearing shall have been given to such person prior to the determination of the comptroller, such person may within thirty days after the comptroller shall give notice thereof, apply to the comptroller for a hearing. After such hearing the comptroller shall give notice of his determination to the applicant. The determination of the comptroller may be reviewed by certiorari if application is made to the comptroller therefor within thirty days after the giving of notice thereof. Whenever under this local law an order of certiorari is permitted it shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice

of the supreme court of the state of New York shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 8. **Proceeding to recover tax.** Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that pro-

vided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 9. **Notices and limitations of time.** Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this local law or in any application made by him or if no return has been filed or application made then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to limitations of time for the enforcement of a civil remedy shall

not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law,

§ 10. **Refunds.** The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made. The comptroller may, in lieu of any refund required to be made, allow credit therefor on subsequent payments due from the applicant. Notice of the determination of the comptroller of any application for refund shall be given to the applicant, who shall be entitled to a certiorari order to review such determination, provided application therefor is made within thirty days after the giving of such notice. An order of certiorari shall not be granted hereunder except in accordance with the provisions of section 7.

§ 11. **General powers of the comptroller.** In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and for cause

shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To request information from the tax commission of the state of New York relative to any person; and to afford information to such tax commission relative to any person, any other provision of this local law to the contrary notwithstanding;

(e) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York;

(f) To prescribe methods for determining the receipts from sales made or services rendered in the city of New York.

§ 12. **Administration of oaths and compelling testimony.** The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 13. **Reference to tax.** Wherever reference is made in sales tags or placards or advertisements to this tax, such reference shall be substantially in the following form: "City sales tax for relief of unemployed," except that in any evidence or memorandum of sales issued or employed by the vendor the word "tax" will suffice.

§ 14. **Registration.** On or before January tenth, nineteen hundred and thirty-five, or in the case of vendors commencing business after January seventh, nineteen hundred and thirty-five, or opening new places of business after such date, within three days after such commencement or opening, every vendor required to collect the tax imposed by this local law shall file with the comptroller a certificate of regis-

tration in a form prescribed by the comptroller who shall within five days after such registration issue without charge to each such vendor a certificate of authority empowering such vendor to collect the tax from the purchaser and duplicates thereof for each additional place of business of such vendor. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be prominently displayed in the places of business of the vendor. A vendor who has no regular place of doing business shall attach such certificate to his cart, stand, truck, or other merchandising device. Such certificates shall be non-assignable and non-transferable and shall be surrendered immediately to the comptroller upon the vendor's ceasing to do business at the place therein named.

A vendor shall refuse to accept a certificate that any property or service upon which a tax is imposed by this local law is purchased for resale and shall collect the tax imposed by this local law unless the purchaser shall have filed a certificate of registration and received a certificate of authority to collect the tax imposed by this local law; provided, however, that the payment of the tax by such purchaser shall not relieve the purchaser of the duty herein imposed upon such purchaser to collect the tax upon any resale made by him; but such purchaser who shall thereafter file a certificate of registration and receive a certificate of authority to collect the tax may, upon application therefor, receive a refund of the taxes paid by him upon property and services thereafter resold by him and upon the receipts from which he shall have collected and paid over to the comptroller the tax herein imposed.

§ 15. **Penalties.** Any person failing to file a return or to pay or pay over any tax to the comptroller within the

time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any vendor or purchaser and any officer of a corporate vendor or purchaser failing to file a return required by this local law, or filing or causing to be filed or making or causing to be made or giving or causing to be given any return, certificate, affidavit, representation, testimony or statement required or authorized by this local law, which is wilfully false, and any vendor and any officer of a corporate vendor wilfully failing to file a registration certificate or to display or surrender the certificate of authority as required by this local law or assigning or transferring such certificate of authority, and any vendor and any officer of a corporate vendor wilfully failing to charge separately from the sales price the tax herein imposed, or wilfully failing to state such tax separately on any evidence of sale issued or employed by the vendor, or wilfully failing or refusing to collect such tax from the purchaser, and any vendor and any officer of a corporate vendor who shall refer or cause reference to be made to this tax in any sales tag, placard or advertisement in a form other than that required by this local law, shall, in addition to the penalties herein or elsewhere prescribed, be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprison-

ment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law, shall be presumptive evidence thereof.

§ 16. **Returns to be secret.** 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner the receipts or other information relating to the business of a taxpayer contained in any return required under this local law. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the comptroller in an action or proceeding under the provisions of this local law, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel or

other legal representatives of the city, or by the district attorney of any county within the city of New York, of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the city he shall be dismissed from office and be incapable of holding any public office in this city for a period of five years thereafter.

§ 17. **Disposition of revenues.** All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§ 18. **Application; construction.** If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local

law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

§ 2. **Effective date of local law.** This local law shall take effect immediately.

The City of New York, Office of the City Clerk, ss:

I hereby certify that the foregoing is a true copy of a local law passed by both branches of the Municipal Assembly of The City of New York and approved by the Mayor on December 28, 1934, on file in this office.

MICHAEL J. CRUISE,
City Clerk.

APPENDIX B

Provisions of 1934 State Enabling Act

LAWS OF NEW YORK

1934

CHAPTER 873.

AN ACT to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws.

Became a law August 18, 1934, with the approval of the Governor. Passed, on emergency message, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five * to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective

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* The powers have been annually extended and have not yet expired.

and ending December thirty-first, nineteen hundred thirty-five,* or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition

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* See footnote, *ante*, p. 21.

of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

STATE OF NEW YORK, DEPARTMENT OF STATE, ss.:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

EDWARD J. FLYNN,
Secretary of State.

APPENDIX C

Provisions of 1933 State Enabling Act

LAWS OF NEW YORK
1933

CHAPTER 815.

AN ACT to relieve the people of any city of the state having a population of one million inhabitants or more from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by temporarily enabling any such city to adopt and amend local laws imposing in any such city any tax which the legislature has or would have power and authority to impose; to limit the application of such local laws to the period commencing September first, nineteen hundred thirty-three, and ending February twenty-eighth, nineteen hundred thirty-four, and to limit the use of the revenue derived from such taxes to the defrayal of the cost of granting unemployment relief in any such city.

Became a law August 29, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby declared that an emergency exists requiring the enactment of the following provisions of law to relieve the people of any city of the state having a population of one million inhabitants or more from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare and to continue their application until the twenty-eighth day of February, nineteen hundred thirty-four.

§ 2. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more, acting through its local legislative body, is hereby authorized and empowered to adopt

and amend local laws imposing in any such city any tax which the legislature has or would have power and authority to impose. Such local laws shall be effective only during the period commencing September first, nineteen hundred thirty-three, and ending February twenty-eighth, nineteen hundred thirty-four, or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any other taxes.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed, without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

§ 3. A local law adopted pursuant to the provisions of this act shall provide that all revenues collected thereunder

shall be paid into a special fund to be established by the chief fiscal officer of any such city and shall be used exclusively for the following purposes: (a) to defray the cost of granting unemployment home and work relief, and (b) to defray the annual cost of the interest on certificates of indebtedness issued in the first instance to obtain funds necessary to provide unemployment home and work relief, and to redeem such certificates of indebtedness.

§ 4. This act shall take effect immediately.

Lawyers Press, Inc., 165 William St., N. Y. C.; 'Phone: BEekman 3-2300

(27435)

FILED
JAN 2 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 44. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,
against
COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF FOR PETITIONER.

January 2, 1940.

WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
Counsel for Petitioner,
Municipal Building,
New York, N. Y.

WILLIAM C. CHANLER,
SOL CHARLES LEVINE,
JEROME R. HELLERSTEIN,
of Counsel.

482 Appeal Printing Co., Inc., 180 Cedar St., New York - WOrth 2-2342

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JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
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against

COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF FOR PETITIONER.

The principal contentions made by this respondent are, we believe, adequately disposed of by our main briefs in the present case and the *Berwind-White* case and our reply brief in that case, copies of which have been furnished to counsel for the respondent.

As for the respondent's contentions that the tax violates the exports or imports clause or that it imposes an undue burden on foreign commerce, we do not propose to debate those issues. They were expressly waived and abandoned below and cannot, therefore, now be raised in this Court.

We propose here to deal only with additional arguments raised by counsel in the instant case.

POINT I.

The opinion of the Court of Appeals does not constitute findings of fact; nothing contained in the opinion concerning the nature of the transactions taxed is binding on this Court.

A considerable portion of respondent's brief is predicated upon the assumption that the Court of Appeals in its opinion made certain findings of fact relative to the business methods involved in respondent's purchases and that such findings of fact are binding on this Court.

In the first place, under New York practice, statements by the Court in opinions do not constitute findings of fact. When findings of fact are made, they are embodied in the formal decision of the Court. The opinions are merely the *ratio decidendi*, constitute no part of the decision, and embrace no findings.

Second, it is obvious that the Court in stating its view of the case was not attempting to resolve conflicting issues of fact. There were no real factual issues as to the business procedures followed by the respondent and its vendor. The only problem considered by the Court was the proper characterization of the undisputed facts in the light of its views as to the principles enunciated in the *Wiloil* and other cases. Certainly, there was no pure question of fact. At most, the Court was confronted with a mixed question of fact and law.

We do not quarrel with the respondent's contention (Br., pp. 10-12) that this Court "has no jurisdiction to revise the decision of the highest court of a state *upon a pure question of fact.*" (Italics ours.) However, it is

well settled that this Court will review even findings of fact by a State court where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts (*First National Bank of Hartford* v. *City of Hartford*, 273 U. S. 548, 552 [1927]; *Northern Pacific Railway Company* v. *North Dakota*, 236 U. S. 585, 593 [1915]).

We believe that all the Court of Appeals intended to do was to apply its views as to the *Wiloil* and other cases to the undisputed facts at bar. And one of the assignments of error in this case is precisely that the Court of Appeals erred in interpreting and applying those cases to the facts at bar.

POINT II.

The respondent has shown no ground for distinguishing the California use tax cases from the case at bar.

The respondent asserts that we have misread the *Southern Pacific* case and points out that the railroad company acquired both title to and possession of the goods in other States, and brought them into California on its own waybills (Resp. Br., p. 22). Although it is true that the goods taxed were shipped into California on the taxpayer's railroad without transportation charge, it is not at all clear either from either the opinion (306 U. S., at p. 173) or the record on appeal that the railroad took title to or possession of the goods, other than as a common carrier, until after they had arrived in California (R., Stip. of Facts, Pars. 34, 35, 36, 37, pp. 113-115). In any

event, this fact is of no importance to the contention we make, for the Court held that it was the "retention and exercise of a right of ownership, respectively," in California, which took place after the interstate shipment had ended and before the consumption in interstate commerce had begun that subjected the transaction to tax. Similarly, in our case it is the taking of possession and title after the interstate shipment has ended and before the consumption in foreign commerce has begun which subjects the transaction to tax. The identity of the two factual situations is unmistakable.

If, however, delivery to the purchaser within the State is essential in order to present a factual situation precisely identical with the California cases, we need only refer to *Pacific Telephone & Telegraph Co.* v. *Gallagher* (306 U. S. 182 [1939]), decided the same day as the *Southern Pacific* case. In that case, the facts of which as applied to an interstate telephone and telegraph company are virtually identical with those in the *Southern Pacific* case, the goods were shipped by the vendor to the taxpayer in California (R., Stip. of Facts, Pars. 3, 17, 23, pp. 63, 70, 73). Indeed, the purchaser-plaintiff in that case receives the "goods at the dock or breaks the seal of the railroad car, as the case may be, and plaintiff's employees unload the goods directly from the dock or car into the [its own] trucks" (R., Stip. of Facts, Par. 17, p. 70).

In upholding the tax, the Court said:

> "The appellant exercises two rights of ownership in California—retention and installation—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material

distinction between the contentions of the appellant and those disposed of in *Southern Pacific Co.* v. *Gallagher, ante,* p. 167."

We think it irrefutable that the "exercise of any right or power * * * incident to the ownership" taxed in the *Pacific Telephone & Telegraph* case is identical with the transfer of title and possession taxed by the statute at bar, and that in both cases it is the taking of possession and dominion over the goods after their interstate journey has ended and before their use in interstate or foreign commerce has begun, which subjects the transaction to tax.

POINT III.

The proceedings below relating to the New York City Personal Property Tax have no bearing on the respondent's liability for the tax at bar.

The respondent states that if we are correct in our contention that the tax at bar is identical with the California use tax, we are "completely out of court" (Resp. Br., p. 25). Counsel contend that the New York City personal property tax has been held to be a use tax; and since the Appellate Division below held that the oil at bar was not subject to the personal property tax and the petitioner failed to appeal from that decision, it follows that we cannot here contend that the sales tax is identical with the California so-called use tax.

This contention is entirely without merit. We contended in the State courts and we contend before this Court that the purchases at bar are subject to tax under the New York City sales tax law. Our contention as to the applicability of the sales tax law was upheld by the

Court of Appeals, since it nullified the assessment solely on constitutional grounds (R. 307). Because the validity of the personal property tax had not yet been passed upon by the State courts and because we did not desire to test the constitutionality of that tax in a case complicated by other factors, we did not contend in the Court of Appeals that the respondent was subject to the personal property tax. But we do not see how that weakens in the slightest our position that the purchases at bar are subject to the sales tax or that the sales tax is identical in terms and effect with the California taxes denominated use taxes. We are in no sense relying upon the New York City personal property tax to sustain the tax at bar. For that reason any holding of the Appellate Division as to the applicability of that tax to the oil at bar is entirely irrelevant to this case.

POINT IV.

The respondent cannot now raise constitutional questions abandoned in the State courts; there is no basis for remanding the case for the consideration of such questions.

(1)

In addition to its contentions based upon the fact that the oil is delivered to it from outside sources of supply, respondent now seeks to argue (1) that the use of the oil to propel the respondent's ships in foreign commerce renders the tax invalid as a burden thereon; (2) that the tax on the oil delivered to the French Line's ships to be used as fuel is a tax on an "export"; and (3) that the storage of the imported oil in a bonded warehouse renders

the purchase immune from tax (Resp. Br., Points III and IV).[1]

Anticipating objection on the score that these contentions were waived and abandoned in the Appellate Division and Court of Appeals, and for that reason not considered by those courts, the respondent seeks to defend its right to have this Court review these questions in the present proceeding (Resp. Br., Point V). However, the fact of intentional waiver and abandonment is entirely clear.

In its reply brief in the Appellate Division, the French Line stated (Reply Br., p. 3):

> "The Court need give no attention to any part of Point I of respondent's [the Comptroller's] brief * * *".

In the Point I referred to, the Comptroller had addressed himself to the precise three questions which the respondent is now seeking to revive here and which are summarized above.

In view of the respondent's abandonment of these points in the Appellate Division, when the case came up in the Court of Appeals, the Comptroller stated (Br., p. 9):

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[1]Respondent also intimates (Br., p. 14), although it does not argue, that the oil was not acquired in New York City but, upon being pumped into the ship, acquired "the situs of the ship which was, as a matter of law, France." Of course, there is nothing to such a position. *Cunard Steamship Co. v. Mellon*, 262 U. S. 100 (1923); *Scharrenberg* v. *Dollar S. S. Co.*, 245 U. S. 122, 1917; *In re Ross*, 140 U. S. 453 (1891). Any contention that transfer of title and possession did not take place in New York City is precluded by the determination of the Court of Appeals that the tax was invalid on grounds solely of federal law (R. 307). The tax would be valid under the sales tax law only if transfer of title and possession took place "within the City of New York" (Local Law 20 of 1934, as amended, §§1, 2).

> "As these points were not pressed by the respondent in the Court below (Petitioner's Reply Brief Below, pp. 3-4), we shall not refer to them further in this brief."

Similarly, the French Line, in its Court of Appeals brief, limited its contentions as follows (p. 3):

> "The issues of law to be decided are (1) Whether the sales and deliveries in suit are transactions in interstate commerce, (2) If so, whether the tax imposed is invalid as constituting a burden upon such commerce."

Accordingly, both sides refrained from making any argument on the points in question before the Court of Appeals, and that Court, of course, did not consider them in deciding the case. In its opinion, it stated (R. 302-304) that the question was the same as that involved in the companion case in that Court, *Matter of Sears, Roebuck & Co.* v. *McGoldrick* (279 N. Y. 184 [1938]), which was an ordinary case of a vendor selling goods shipped across State lines.

There can be no doubt, therefore, that the respondent deliberately waived and abandoned the points in question and for that reason it was not considered by the State court, and is not an issue in the case.

Accordingly, it is hardly necessary to cite *New York ex rel. Cohn* v. *Graves* (300 U. S. 308 [1937]), and numerous other cases holding that: "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there; whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented."

(2)

The respondent now suggests the possibility of a remand to the Court of Appeals for a further consideration of these questions in the event this Court should decline to consider them. However, since the waiver and abandonment were deliberate, there is no basis for such a request. It is not now open to respondent to ask the State court to consider a federal ground which it expressly waived, and thereby induced the State court not to consider. That issue is foreclosed in the State court by respondent's abandonment. For that reason a remand to the Court of Appeals could serve no useful purpose.

(3)

If, despite the waiver and abandonment, the points in question are resuscitated, in lieu of any extended treatment of them in this case, we respectfully refer the Court to their full treatment in POINTS I and III of our main brief in the companion *Gulf Oil Company* case, No. 473.

In that brief we show, among other things, that the subsequent use of the oil in propelling a vessel in foreign commerce cannot render invalid a tax on the *prior* sale; that oil delivered to a ship to be consumed as fuel is not an export; and that the prior storage of the imported oil in a bonded warehouse does not render invalid a tax on the *subsequent* sale.

Conclusion.

The final order and judgment should be reversed and petitioner's determination confirmed.

January 2, 1940.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
Counsel for Petitioner.

WILLIAM C. CHANLER,
SOL CHARLES LEVINE,
JEROME R. HELLERSTEIN,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1938

No. [redacted] 44

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD S. DEMING,
Counsel for Respondent.

DONALD HAVENS,
BERNARD D. ATWOOD,
Of Counsel.

JUDICIAL PRINTING COMPANY, INC., 82 Beekman Street. BEekman 3-6966-6967

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 943

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinions below are printed in Appendix C of the petition and are correctly cited. The opinion of the New York Court of Appeals (R. 302*) is reported in 279 N. Y. 192; the opinion of the Appellate Division (R. 294) is reported in 254 App. Div. 237.

* References are to pages of the record printed for this Court.

Jurisdiction

The jurisdiction of this Court is invoked under section 237, as amended, of the Judicial Code (28 U. S. C., § 344, subd. b), upon the ground that the New York City Sales Tax Law, as applied to the transactions here involved, violates the Commerce Clause (Art. I, Sec. 8, Clause 3) of the Constitution of the United States. Pertinent excerpts from the applicable statutes will be found in Appendices A and B hereof.

Statement of the Case

The respondent, Compagnie Generale Transatlantique (more familiarly known as the "French Line"), is a French corporation engaged in the transportation of passengers and freight by sea between the United States and foreign countries, with its headquarters in Paris. The business is carried on in the respondent's ships sailing under the French flag and registered in French home ports. All the ships were employed throughout the tax period in foreign commerce (R. 25, 64, 74).

The ships operate on fast schedules which necessitate a quick turn-around in the Port of New York. Refueling takes place during this short time at respondent's pier in the City of New York. Oil is purchased for this purpose by respondent from the Standard Oil Company of New Jersey, is transported by barge from the latter company's storage tanks *in New Jersey* and pumped directly from the barges into the ship's bunkers (R. 106, 51, 120-121).

A tax of 2% was asserted under Local Law No. 20 of 1934 of the City of New York, as amended, during the

period commencing December 10, 1934, and ending December 31, 1935, on the purchase price paid for this oil by respondent (R. 9, 25). The statute is the New York City Sales Tax Law. The tax is imposed "upon the amount of the receipts from every sale in the City of New York" of tangible personal property sold at retail (§ 2).

Both the Court of Appeals and the Appellate Division held that the assessment with respect to the deliveries from New Jersey should be annulled (R. 302, 294). A judgment has been entered ordering refund of the tax (R. 308). In both courts the basis of the decision was that imposition of the tax was in conflict with the Commerce Clause.

The Standard Oil Company of New Jersey transports the oil from Venezuela (with the exception of a few instances in which domestic oil may have been used [R. 106]) and stores it in the State of New Jersey, where it has extensive storage and refining facilities. If refined before importation, it is stored in bond. If imported as crude, it is handled as drawback oil and refund of duties is obtained after consumption by the respondent (R. 188-189). No facilities are maintained by the seller for storage or refining in the City of New York (R. 105, 196-200, 206). Before entering into the contract for the purchase of the oil, respondent examined Standard Oil's docks and plant in New Jersey in order to determine whether its facilities were sufficiently adapted to and capable of meeting respondent's needs (R. 30).

For years respondent has been pursuing the same course of dealings under its contracts, taking delivery in New York of oil from Standard Oil's plants in New Jersey. During

a period of eight years all but five of 971 deliveries to respondent were made from the State of New Jersey and from the Standard Oil plants (R. 28, 30, 223-225).

In the face of these facts, petitioner in his statement of the case (at page 11 of his brief) urges this Court to consider that:

> "Neither the letters nor the agreement contain any provision requiring the oil to come from New Jersey or from anywhere else. No mention is made in them of a shipping point, the oil being sold merely 'delivered' * * *. Respondent is never notified, nor does it ever ascertain, where shipment is to be made from or where it is actually made from * * *. So far as the use of the oil is concerned, the source of supply makes no difference whatever * * *."

The Court of Appeals, however, reached the following conclusions in respect of the transactions (R. 303, 304):

> "These two companies have been doing business for many years, and it was well understood that the oil of the Standard Oil Company of New Jersey was stored in thousands of tanks in Bayonne, New Jersey. So far as this record shows, it had no storage facilities in New York City. * * * The oil was brought from New Jersey by the oil company's barges. * * * the Standard Oil Company of New Jersey maintains a large number of oil tanks in Bayonne, New Jersey, and the vicinity. The steamship company knew that the nature of the business required oil to be stored in large quantities, and that the oil company had such a plant, and delivered its oil by drawing it off from these tanks into ships at Bayonne, or else into barges, to be carried to vessels at the port of New York. While the purchase or the contract of sale was made in New York, it was with a view of get-

ting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. *The product in New Jersey, kept there in tanks, was the thing bargained for.* So far as the record in this case goes, the contract centers around the purchase of the New Jersey oil of the kind and quantity specified. The delivery at the Port of New York was made necessary because of the draft of the steamers. * * *

Here, * * * there is a special product of the Standard Oil Company of New Jersey which has to be kept in great receptacles built for the purpose which we can treat by analogy as a manufacturing plant. *It is the articles of this plant in New Jersey which the purchaser seeks.* At the office of the seller in New York it bargains for this oil to be put in its ships. We think, under the principles stated in the *Sears, Roebuck* case and the authorities there cited, *that this is a contract for interstate shipments*" (Italics ours).

Summary of Argument

I.

The petitioner is asking this Court to review a determination of facts and not an interpretation of decisions of this Court.

II.

This Court has refused to grant a petition for certiorari in the *National Cash Register* case, which involved the same constitutional question and a state of facts of much broader application than here involved.

III.

Petitioner has cited no decision of this Court with which the decision of the Court of Appeals is not in accord.

ARGUMENT

I.

The petitioner is asking this Court to review a determination of facts and not an interpretation of decisions of this Court.

Petitioner sets forth two questions which are presented by this case (Petition, p. 5). Question (b) is;

> "Do respondent's purchases of fuel oil 'require or necessarily involve transportation across the state boundary' in the sense in which those words were used in *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 174 (1935)?"

The petitioner argued at length in the Court of Appeals that the transactions involved in this case were on all-fours with the transaction in the *Wiloil* case and that that case was controlling of the issues here presented. Both the Appellate Division and the Court of Appeals interpreted the contract otherwise. In the *Wiloil* case it was held that the seller "was not required by the contract to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania." In the present case the Court of Appeals has held that the contract called for the delivery in New York of oil stored in New Jersey—"*the product in New Jersey, kept there in tanks was the thing bargained for.*" The petitioner is now asking this Court to review this determination of the Court of Appeals as to the terms of the contract between the parties. The comparison of petitioner's and the Court

of Appeals' statements of the facts set forth at pages 4 and 5 above makes this clear.

It is obvious from this comparison that the petitioner's real quarrel is with the Court of Appeals' determination that the contract between the parties called for the delivery in New York of oil stored in New Jersey and that he is asking this Court to review such determination. Without expressly stating at any place in his petition or brief that this determination is wrong, and in fact without including in his assignments of errors any specific assignment to that effect, petitioner merely ignores the Court of Appeals' findings and frames his own statement of facts.

It is true that petitioner, in an attempt to bring himself within paragraphs 5(a) of Rule 38 of this Court, frames his assignments of errors in terms of "an erroneous interpretation of the *Wiloil* case", but it is the interpretation of the contract, not the interpretation of the *Wiloil* case, which the petitioner is in reality asking this Court to review. In the *Wiloil* case this Court held that the contracts "did not require or necessarily involve transportation across the state boundary" and "as interstate transportation was not required or contemplated it may be deemed as merely incidental." It requires no "interpretation" of the *Wiloil* case to find that a contract for the sale and delivery in New York of oil stored in tanks in New Jersey requires and necessarily involves transportation across the state boundary and that interstate transportation was required and contemplated.

II.

This Court has refused to grant a petition for certiorari in the National Cash Register case, which involved the same constitutional question and a state of facts of much broader application than here involved.

The same ignoring of the Court of Appeals' interpretation of the contract is revealed in petitioner's statement at page 7 of his petition that "these are test cases". Under his interpretation of the contract this might be true. It can hardly be true on the facts as found. Here we have a foreign steamship company purchasing bonded or drawback oil stored out of the state for delivery to its foreign flag vessels while in New York harbor during the brief "turn-around" period between their arrival in port from France and their return thereto. The oil is brought by seller's barges and pumped directly into the vessel's tanks. As the Appellate Division said (R. 296):

> "• • • there was no break in transit. • • • The oil was immediately • • • pumped from the lighters into the bunkers of the ship and thereupon became a part of the ship. The vessels themselves had no taxable situs here. (*Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; *Ayer & Lord Co.* v. *Kentucky*, 202 *id.* 409; *People ex rel. Astor Trust Co.* v. *State Tax Commission*, 174 App. Div. 320, 324)."

It can hardly be true, as petitioner states, that "large numbers of purchasers and sellers and sums of money running into millions of dollars anually are involved". The decision can be rested upon the narrow state of facts which

is probably duplicated only by the few foreign steamship companies running to the Port of New York and purchasing out-of-state fuel or supplies.

The narrow grounds of the decision are further indicated by the distinctions drawn between this and the case of *Sears Roebuck & Co.* v. *McGoldrick*, 279 N. Y. 184, decided the same day, in which the tax was upheld. The Court of Appeals said in this case "the only distinction upon the facts in this case and those in the *Sears Roebuck & Co.* case rests in the nature of the respondent's business."

Petitioner states at page 15 of his brief that so far as he is aware, "this is the first case presented to this Court in which a purchaser-consumer has complained that a retail sales tax levied upon him imposes an invalid burden on interstate commerce." This statement is correct, so far as respondent is aware, to the extent that it is limited to the complainant being the purchaser. It is not, however, the first case presented to this Court involving the validity of a state sales tax imposed by the purchaser's state. *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208; certiorari denied 303 U. S. 656, involved the validity of the New York City sales tax as applied to purchases by New York residents of goods shipped from outside the state. The only distinctions between that and the present case are:

(a) In the *National Cash Register* case the purchase orders were accepted outside of New York. This is not important—it is not the place of the making of the contract which determines whether interstate commerce is involved (*Real Silk Hosiery Mills* v. *City of Portland*, 268 U. S. 325) but whether transportation across state lines is the "normal, contemplated and followed course" of dealings. (*Western Union* v. *Foster*, 247 U. S. 105, 113.)

(b) In the present case the oil never came to rest in New York State or became a part of the mass of property in New York State. It was pumped into and became a part of a foreign registered vessel engaged in foreign commerce.

It is interesting to note that the Comptroller in his petition for a writ of certiorari in the *National Cash Register* case made the same plea which he makes in his present brief,—that the Court of Appeals had invalidated a type of tax which has never been invalidated by this Court. There is less reason for granting the writ in the present than there was in that case. The present case is clearly within the principles of the *National Cash Register* case but, because of its special facts, is of much more limited application.

The Comptroller in his petition to the Court of Appeals for reargument, and for amendment of the remittitur in the present case, suggested that it is possible that the denial of certiorari in the *National Cash Register* case was based upon this Court's belief that the case did not present an exclusively federal question. We can find no basis in the record for this possibility. The Court of Appeals based its decision in that case exclusively on Federal constitutional grounds.* The Comptroller's petition for certiorari stated the questions presented as exclusively federal questions. The respondent agreed with the petitioner that only federal questions were involved.

This Court also denied certiorari in another case involving the same Local Law and substantially the same facts as the *National Cash Register* case. *McGoldrick* v. *West Publishing Co.*, 303 U. S. 656 (276 N. Y. 535, *sub nom.*, *Matter of West Publishing Co.* v. *Taylor*).

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* This alone was sufficient to bring the *National Cash Register* case within the jurisdiction of this Court. *Virginia* v. *Imperial Coal Sales Co., Inc.*, 293 U. S. 15.

III.

Petitioner has cited no decision of this Court with which the decision of the Court of Appeals is not in accord.

Petitioner has cited no case decided by this Court with which the decision of the Court of Appeals in this case is not in accord. In *Western Live Stock* v. *Bureau*, 303 U. S. 250, the gross receipts tax imposed upon the advertising receipts of a magazine was held valid on the ground that the receipts were not from interstate commerce except to the extent that "the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate" and as to this factor "the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax." The *Wiloil* case has been discussed above. In *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210, the tax was imposed not upon the sale by the out-of-state manufacturer to the dealer but upon the resale, effected within the state, by the dealer to his customer. *Woodruff* v. *Parham*, 8 Wall. 123, and *Hinson* v. *Lott*, 8 Wall. 148, both involved taxes upon sales by local merchants of goods previously brought into the state.

All of the other cases cited by petitioner on page 16 of his brief are "use" tax cases. Petitioner endeavors to sustain the relevancy of these cases by contending that "use" taxes are not distinguishable from sales taxes. He argues at page 17 of his brief that "the New York City sales tax is, moreover, *identical* in substance with the California

tax * * * sustained in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra* * * *." The argument is one of desperation and demonstrates petitioner's lack of confidence in his other contentions. This Court has squarely held that a "use" tax is not a tax upon the sale: In *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, involving the Washington use tax statute, which is substantially the same as the California statute, Mr. Justice CARDOZO said (at page 587):

> "Finally, there is argument that the tax now in question, though in form upon the use, was in fact upon the foreign sale, and not upon the use at all, the form being a subterfuge. The supposed basis for that argument is a reading of the statute whereby the use shall not be taxable if the chattel was manufactured by the user or received as a legacy or acquired in any way except through the medium of purchase, and a retail one at that. But the fact that the legislature has chosen to lay a tax upon the use of chattels that have been bought does not make the tax upon the use a tax upon the sale."

The use tax statutes have been upheld, when applied to articles acquired in interstate sales, upon the basis of the very distinction which petitioner now seeks to abolish, to wit,—that although a sales tax would tax the *interstate sale* the use tax statutes impose the tax on the *intrastate use*, a taxable event which does not take place until after interstate commerce has ceased.

Moreover, if petitioner were correct in his contention that the New York City Sales Tax is identical with the California Use Tax, he is completely out of court. The New York City Personal Property tax (Appendix C), which supplements its Sales Tax here involved, has been held to

be a "use" tax. See *Williamsburgh Power Plant Corp.* v. *City of New York*, 255 App. Div. 214; affirmed without opinion, 280 N. Y. Adv. 57 (Memo.).

The Appellate Division held in the case at bar that the oil was not subject to the New York City Personal Property tax, stating at page 240 of 254 App. Div. (R. 297):

> "Finding as we do, that the New Jersey shipments never came to rest and acquired no situs in this State and that the interstate or foreign commerce was uninterrupted and continuous, the Personal Property Tax Law also did not apply. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582; *Minnesota* v. *Blasius, supra*, p. 10)."

The petitioner took no appeal from this determination and argued in the Court of Appeals only that the oil was subject to the sales tax. He has acquiesced in the lower court's determination that the oil is not subject to a use tax and is bound thereby. If, therefore, the sales tax is, as petitioner contends, a use tax, there remains no question for determination by this Court.

CONCLUSION

The decision of the Court of Appeals was in all respects correct and was based on rules long adhered to by this Court; and the petition should be dismissed.

It would, we believe, be difficult to conceive of a transaction which the Commerce Clause was more designed to protect from state interference than that involved in this case. Oil is imported from Venezuela and stored in tanks in New Jersey. If refined oil, it is imported in bond; if

crude it is imported as drawback oil. It is carried by tank barge from these storage tanks in New Jersey to alongside the respondent's vessels in New York harbor, where it is pumped directly into the vessels' tanks. Because of the brief time the respondent's vessels are in port, the ordering of the oil and the dispatching of the tank barges has to be carefully timed to synchronize with the vessels' arrivals. The barges arrive at the vessels' pier either immediately before or at the same time as the vessels, in order to insure the completion of loading of the oil before the vessels depart again for France (R. 184). It is a distinctly "on the wing" operation. If New York City can tax the sales of fuel oil so in transit from the New Jersey refinery and storage tank to an outbound foreign steamer, what transactions are protected by the Commerce Clause?

Dated: New York, N. Y., May 25, 1939.

Respectfully submitted,

HAROLD S. DEMING,
Counsel for Respondent.

DONALD HAVENS,
BERNARD D. ATWOOD,
Of Counsel.

APPENDIX A.

Laws of New York Provisions of State Enabling Act.

Chapter 873, 1934

Section 1. Notwithstanding any other provision of law to the contrary, any city of the State having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending December thirty-first, nineteen hundred thirty-five, or any portion of such period. *A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.* [Italics ours.]

* * *

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-resi-

dents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

APPENDIX B.

Local Laws of the City of New York.

Sales Tax.

For the Year 1934, No. 20 as amended by No. 24.

• • • •

§1. Definitions. When used in this local law:

(a) The word "person" includes an individual, copartnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

• • • •

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

• • • •

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

• • • •

§ 2. Imposition of tax. During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid a tax of two per centum upon

the amount of the receipts from every sale in the city of New York of;

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

• • •

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and *receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax shall not be subject to tax hereunder.* [Italics ours.]

• • •

Where a purchaser has failed to pay and a vender has failed to collect a tax upon a sale or service, as imposed by this local law, *then* in addition to all other rights, obligations and remedies provided, *such tax shall be payable by the purchaser directly to the comptroller* and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered. [Italics ours.]

• • •

The *comptroller* may, wherever he deems it necessary for the proper enforcement of this local law, *provide* by regulation *that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed,* at such times as returns are required to be filed and payment over made by vendors. [Italics ours.]

APPENDIX C.

New York City Personal Property Tax.

For the year 1935, No. 25 of 1934, as amended by No. 13 of 1935.

Sec. 1. Imposition of Tax. During the period commencing on January first, nineteen hundred and thirty-five and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid by the owner a tax of two per centum upon the value of the following-named *articles of personal property situated or owned within the City of New York.*

* * *

(k) Oil, gas, gasoline and other combustibles.

Sec. 2. Exemptions. No tax, as imposed by Section 1 of this title shall be due or payable in any event upon any of the articles enumerated in the said section 1, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the Comptroller.

* * *

c. That the said article is one *upon the receipt from the sale of which a tax has been paid* pursuant to the provisions of this law or Local Law 20, of 1934, as amended. [The City "Sales Tax"] (Italics ours).

* * *

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vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

HAROLD S. DEMING,
Counsel for Respondent,
80 Broad Street,
New York, N. Y.

DONALD HAVENS,
BERNARD D. ATWOOD,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 44

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the New York Court of Appeals (R. 302) is reported in 279 N. Y. 192 and its supplemental opinion on motion for reargument in 280 N. Y. 691; the opinion of the Appellate Division (R. 294) is reported in 254 App. Div. 237.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under section 237, as amended, of the Judicial Code (28 U. S. C.,

§ 344, subd. b), upon the ground that the Court of Appeals was in error in holding that the New York City Sales Tax Law, as applied to the transactions here involved, violates the constitutional rights of Respondent.

The Statutes

The Enabling Act and the local Sales Tax Law will be found in "Appendix of Statutes" submitted by Petitioner in connection with his brief. The Personal Property Tax Law will be found in Appendix B of Respondent's brief in No. 475, *McGoldrick* v. *Berwind-White Coal Mining Company;* excerpts from the Personal Property Tax Law, as amended, are printed as an appendix to this brief.

Statement of the Case

In contrast to the Petitioner's statement of facts, the Respondent directs the Court's attention to the findings of fact of the Courts below as set forth in their opinions. The paragraphs headed "Appellate Division" are taken from the opinion of the Appellate Division of the New York Supreme Court (254 App. Div. 237, 239-241; R. 294). The balance of the findings quoted below are from the opinion of the New York Court of Appeals (279 N. Y. 192, 197-198; R. 303, 304):

Appellate Division

"The petitioner, more commonly known as the French Line, is a French corporation, engaged in the transportation of passengers and freight between the

United States and foreign countries. It is authorized to do business in this State and maintains in New York City a general agency for the United States and Canada for the sale of steamship tickets, the soliciting of freight, the operation of its piers, and the purchasing of supplies for its vessels.

"The Standard Oil Company of New Jersey is a Delaware corporation. It, too, has offices in New York. Part of its business is the sale of bunker fuel and Diesel fuel oil. It has no storage tanks or other supplies located in New York City. It maintains at Bayonne, New Jersey, a large storage, refining and shipping plant. Another plant is at Bayway, New Jersey.

"Bonded Standard bunker 'C' fuel oil is refined oil stored in the tanks of the Standard Oil Company, free from the payment of any import duty to the United States, at all times under the supervision of the Customs Service. A bond to insure payment to the United States of any import duty which would become due if the oil should be used for domestic purposes is required. When delivered to a foreign steamship, a release from the bond is granted.

"'Drawback' oil is oil imported from South America and refined at Bayonne or Bayway, New Jersey, at the plants of the Standard Oil. An import duty is paid thereon, but upon exportation or delivery to foreign steamship, a refund of such duties is made. Save for a few deliveries originating at Staten Island, all deliveries were of oil of these types.

"For many years prior to the enactment of the Local Laws in question, the Standard Oil had agreements with the petitioner for the furnishing of this fuel and Diesel oil to the vessels of the petitioner at their piers in New York City. As certain vessels with a limited draft could dock at Bayonne and

there receive the oil, there was a five-cent differential placed on oil delivered in Bayonne or in New York City. It does not appear, however, that any deliveries were ever made to the petitioner in New Jersey.

"As refueling of the petitioner's vessels in this city was required to be very expeditious, because of a quick 'turn-around', the following procedure was adopted between the petitioner and the Standard Oil. The incoming liner, about forty-eight hours before arrival at the Port of New York, would radio an estimate of the bunker requirements to the petitioner's New York office. Thereupon the petitioner's employee would telephone the Standard Oil shipping clerk in New York City and place the order. It was so timed that the barges on which the oil was transported from New Jersey to the vessel would arrive ten or fifteen minutes after the vessel had completed docking. Thereupon the oil was pumped directly from the barges into the fuel bunkers.

"While the contracts between these parties did not specifically require that this oil should come from New Jersey or any other specified locality, the fact is, as already noted, that the only sources of supply for oil of this character in this vicinity controlled by the Standard Oil were its plants in Bayonne and Bayway, New Jersey. Furthermore, the petitioner knew that this would be the immediate source of the fuel oil and, of course, the petitioner had the right, specifically granted in the contracts, to fuel its vessels at Bayonne, were they of sufficiently shallow draught. Moreover, the contracts required delivery to the steamer.

"Certain small deliveries in emergency periods were made by oil borrowed by the Standard from competitors, and two of such deliveries had their origin at Staten Island in New York City, where the competing firm had its oil.

"We are of opinion that, with respect at least to the New Jersey originating deliveries mentioned, there could be assessed and collected no tax under the City Sales Tax Law.

"As to those shipments originating in New Jersey, they were interstate transactions, and hence not taxable by the State of New York. The City, deriving its power from the State, could have no greater right. Delivery from New Jersey was the 'normal, contemplated and followed course' of dealing (*Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 113).

"There was here no ending of the interstate transaction, nor had the oil come to rest in this jurisdiction so as to acquire a situs herein. There was no break in transit. Under such circumstances there was an entire and exclusive interstate transaction (*Minnesota* v. *Blasius*, 290 U. S. 1).

"The oil was immediately, as already stated, pumped from the lighters into the bunkers of the ship and thereupon became a part of the ship. The vessels themselves had no taxable situs here. (*Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; *Ayer & Lord Co.* v. *Kentucky*, 202 U. S. 409; *People ex rel. Astor Trust Co.* v. *State Tax Commission*, 174 App. Div. 320, 324.) [1]

• • • • • • • •

"Finding, as we do, that the New Jersey shipments never came to rest and acquired no situs in this State and that the interstate or foreign commerce was uninterrupted and continuous, the New

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[1] Omitted here is the Court's discussion of certain cases including *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169 (1935), and a reference to a concession made by Respondent (the Petitioner in the Appellate Division) that as to the emergency deliveries originating at Staten Island the sales tax of $292.83 should apply. The concession was made solely for the purpose of leaving for decision in that Court in the pending *Gulf Oil Corporation* case, in which no other question was raised, the question of the taxability of bonded oil delivered from storage within the city (see p. 31, *infra*).

York City Personal Property Tax Law also did not apply (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582; *Minnesota* v. *Blasius*, *supra*, p. 10)."

COURT OF APPEALS

"The contract for the period in question for fuel oil is contained in a letter accepting an offer to extend a previous fuel oil contract until December 31, 1936. It states that the Standard Oil Company of New Jersey is to supply the total fuel oil requirements at New York of all the oil burning vessels of the Compagnie Generale Transatlantique during the period of the contract up to a maximum of four million barrels per year. The maximum price is fixed at $1.10 per barrel, with provision for increases. The contract for the Diesel fuel was also made at New York for a period up to December 31, 1935, not to exceed fifteen thousand barrels in any one month, and up to, but not exceeding one hundred thousand barrels during the term of one year. Delivery shall be made by barge provided by the seller to the buyer's vessel at dock within the harbor limits at New York, or to the buyer's vessel alongside dock of seller at New York. The price varies according to the place of delivery.

"These two companies have been doing business for many years, and it was well understood that the oil of the Standard Oil Company of New Jersey was stored in thousands of tanks in Bayonne, New Jersey. So far as this record shows, it had no storage facilities in New York City. As the *Normandie* or the *Paris* or the *Champlain* or the *Lafayette* approached the harbor in New York, messages were sent to the Standard Oil Company's office in New York City indicating the amount of fuel that would be necessary, and with the docking of the steamer at the steamship company's pier, barges of the oil company would soon be alongside prepared to pump the

oil into the steamer's tanks. The oil was brought from New Jersey by the oil company's barges. Both the Standard Oil Company of New Jersey and the Compagnie Generale Transatlantique were doing business in the City of New York. The latter had its piers and office at the foot of Fiftieth Street, and places of business at 19 State Street and 610 Fifth Avenue, Manhattan. The offices of the Standard Oil Company of New Jersey were at 26 Broadway, New York City.

* * * * * *

"* * * The steamship company knew that the nature of the business required oil to be stored in large quantities, and that the oil company had such a plant, and delivered its oil by drawing it off from these tanks into ships at Bayonne, or else into barges, to be carried to vessels at the Port of New York. While the purchase or the contract of sale was made in New York, *it was with a view of getting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. The product in New Jersey, kept there in tanks, was the thing bargained for.* So far as the record in this case goes, the contract centers around the purchase of the New Jersey oil of the kind and quantity specified. *The delivery at the Port of New York was made necessary because of the draft of the steamers.* The cost of transportation from Bayonne to the Port of New York increased the price.

* * * * * *

"Here, * * * there is a special product of the Standard Oil Company of New Jersey which has to be kept in great receptacles built for the purpose which we can treat by analogy as a manufacturing plant. *It is the articles of this plant in New Jersey which the purchaser seeks.* At the office of the seller in New York it bargains for this oil to be put in its ships. We think, under the principles stated in the

Sears, Roebuck case and the authorities there cited, *that this is a contract for interstate shipments* • • •" (Italics ours.)

Each of the above statements taken from the opinions of the Courts below finds ample support in the record; specific references will be found in the footnote.[1]

Decision of the Court of Appeals

It is upon the basis of the foregoing facts as found by the New York Courts that the Court of Appeals determined (as stated in the amended remittitur) that the attempted imposition of the tax was invalid "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. 1, Sec. 8, Clause 3) of the Constitution of the United States." 280 N. Y. 691. The conclusion of the Court of Appeals, as stated in the opinion, was "that this is a contract for interstate shipment, and that the tax upon such a sale is a direct tax on interstate commerce." Accordingly, the Court of Appeals affirmed a judgment for refund of the tax paid.

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[1] Business of Respondent, R. 64, 68; location of offices of Respondent and Standard Oil Company, R. 66, 125; authorization of Respondent to do business in New York, R. 65; place of incorporation of Respondent and Standard Oil Company, R. 65, Exh. 40, R. 286 A; testimony describing "bonded" oil and "drawback" oil and the method of handling and disposing of both types, R. 188-198, 133-134; the contracts in question, Exh. Nos. 10, 13, 14, R. 236, 240, 241-242; testimony describing the method of ordering the oil prior to the arrival of the ships and the actual barging and handling of the oil, R. 121-122, 126-133; location of Standard Oil Company's tanks, R. 198, 205, 206; facts relating to delivery, R. 174-176, 133; facts relating to the bargaining for the oil in New Jersey and the course of business, R. 106, 126-143, 175, 223, 225; testimony establishing that out of 971 deliveries, 99-1/5% were from the Standard Oil Company's plant and only 4/5ths of 1% were emergency borrowings from competitors, Exh. 27, R. 257, 148, 222-225; testimony relating to emergency deliveries and establishing that 99-4/5% of the deliveries were made from New Jersey to New York and only 1/5th of 1% of the deliveries were made from within New York City or State, R. 149-150, Exh. 27, R. 257, 148, 222-225.

The determination of the Court of Appeals can (as we shall demonstrate under Points III and IV of this Brief, pp. 32 to 49, *infra*) be supported upon constitutional grounds other than that stated in the remittitur; but we shall deal first with the ground which the Court of Appeals deemed it sufficient to consider.

Summary of Argument

I—The Court of Appeals was correct in holding that the imposition of the New York City Sales Tax as applied to the Respondent's purchases was in violation of the United States Constitution because it was "a direct tax on interstate commerce."

A. The sales and deliveries in question are transactions in interstate commerce

B. The tax is an absolutely direct burden on interstate commerce

II—Comments on arguments in petitioner's brief.

III—The fuel oil is not subject to the New York City Sales Tax because at all times it retained its distinctive character as an import under the protection of Article 1, Section 10, Clause 2 of the Constitution of the United States as well as that of the Commerce Clause; it never acquired a situs within the City of New York or became a part of the mass of property within the city.

IV—The proposed imposition of the City Sales Tax on the transfer of title and possession of the fuel oil at the

moment of its discharge into the bunkers of Respondent's foreign flag vessels engaged in the carriage of passengers and merchandise to foreign ports would violate Article 1, Section 10, Clause 2 of the Constitution of the United States prohibiting State taxation of exports.

A. The proposed taxation of the fuel oil would constitute taxation of the process of exporting the merchandise carried in Respondent's vessels

B. The deliveries of fuel oil in question are, themselves, "exports" within the meaning of Article 1, Section 10, Clause 2 of the Constitution

V—Respondent is entitled on the present record to have this Court sustain the judgment of the Court below, if necessary, upon the grounds set forth in Points III and IV, *supra*.

POINT I

The Court of Appeals was correct in holding that the imposition of the New York City Sales Tax as applied to the Respondent's purchases was in violation of the United States Constitution because it was "a direct tax on interstate commerce."

A.

The Sales and Deliveries In Question Are Transactions In Interstate Commerce

The Courts below have found as facts that "While the purchase or contract of sale was made in New York, it

was with a view of getting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. The product in New Jersey, kept there in tanks, was the thing bargained for. * * * The delivery at the port of New York was made necessary because of the draft of the steamers. The cost of transportation from Bayonne to the port of New York increased the price. * * * Here * * * there is a special product of the Standard Oil Company of New Jersey which has to be kept in great receptacles built for the purpose * * *. It is the articles of this plant in New Jersey which the purchaser seeks. At the office of the seller in New York it bargains for this oil to be put in its ships." They found further as a fact that "Delivery from New Jersey was the 'normal, contemplated and followed course' of dealing." They found further as a fact that "There was here no ending of the interstate transaction, nor had the oil come to rest in this jurisdiction so as to acquire a situs herein. There was no break in transit."

The Petitioner now seeks to assert before this Court that "The source of shipment is a matter of complete indifference to the taxpayer." He made the same assertion before the Court of Appeals, which has found the fact to be otherwise. It is a well settled principle in this Court requiring no extended citation of cases that this Court will not interfere with the findings of fact of the Courts below unless such findings are without any substantial support in the record.

Israel v. *Arthur*, 152 U. S. 355, 362 (1894):

> "And it has been often held, at least in actions at law, that this court has no jurisdiction to revise the decision of the highest court of a State upon a pure question of fact, although a Federal question

might arise if the question of fact were decided in a particular way."

This is so even where there is dissent in the Court below on the questions of fact. See *Minnesota & St. Louis R. R. Co.* v. *Minnesota*, 193 U. S. 53 (1904), where it was expressly held that the rule remained unchanged, although the State Supreme Court had evenly divided on the findings of fact made by the lower Court. This Court stated at pages 64-65:

> "It is well established that on error to a state court this court cannot reexamine the evidence, and when the facts are found we are concluded by such finding. *Egan* v. *Hart*, 165 U. S. 188. But in the case at bar we are met by the circumstance that the Supreme Court equally divided on the question whether the facts distinguish this case from 76 Minnesota, 469. The plaintiff in error, therefore, contends that there has been no judgment of the Supreme Court on the facts and they are open to review here. The contention is not tenable. There is no statement of facts by the Supreme Court, and its decision, though by a divided court, constituted an affirmance of the finding of the District Court.
>
> * * * * * *
>
> The finding, like the verdict of a jury, is conclusive in this court. *Dower* v. *Richards*, 151 U. S. 658."

A sharp distinction is, of course, to be drawn between findings of fact and conclusions of law. See, for example, Mr. Justice BRANDEIS' comment in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921) at 295, that the decision of that case involved two determinations: "One was of fact—whether the wheat was sold and bought for shipment to Tennessee. The other was of law—whether

the fact that the wheat was so sold and bought makes the transaction one in interstate commerce." So here: there was before the Court of Appeals first, the questions of fact as to the intent of the parties to bargain for specific oil and what was "the normal, contemplated and followed course of dealing"; and then the question of law as to whether that intent and those dealings made the transactions transactions in interstate commerce. That the consideration of the facts as facts by the Court of Appeals was careful and thorough is obvious from their sharp differentiation of the essential facts in the case at bar from those in the *Sears, Roebuck* case. There was no careless commingling of facts and law in the opinion but a clear determination of the facts before reaching a legal conclusion (upon the basis of those facts) that the transaction was one of interstate commerce upon which the proposed tax could not validly be imposed.

Under these conditions we respectfully submit that the findings of fact as to the intent of the parties and their actual course of dealing are not to be challenged in this Court but are to be accepted as the basis for the determination of the questions of law thereby presented.

In brief, then, we are dealing with long continued purchases by the Respondent Steamship Company of specific fuel oil stored in New Jersey for delivery by barge, under customs seal, to its vessels at their New York City piers, the barges (in order not to delay the quick turn-around of the vessels in their transatlantic trade) timing their arrivals to coincide as closely as possible with that of the steamers and pumping the oil directly into the fuel tanks of the steamers for consumption upon the foreign voyages about to begin.

We submit that this represents interstate commerce in its simplest form. The entire transaction was in each case in interstate commerce from the moment the oil left the storage tanks in New Jersey until title and possession passed to the Respondent absolutely synchronously with the pumping of the oil into the ship and its acquisition thereby of the situs of the ship which was, as a matter of law, France. Strictly speaking, it may even be questioned whether, as a matter of law, title and possession passed within the City of New York. Transportation is never complete until delivery and receipt, which, in this case, was at the end of a hose nozzle deep in a ship having no situs in the city. "Finding, as we do, that the New Jersey shipments never came to rest and acquired no situs in this State and that the interstate or foreign commerce was uninterrupted or continuous" the Appellate Division of the New York Supreme Court held that "the New York City Personal Property Tax Law also did not apply"—a holding from which the Petitioner has never appealed.

In any event, as the oil never even for an instant came to rest in the City or acquired a situs there, the tax, if imposed at all, must be imposed upon the transfer of possession which was at one and the same instant an integral and indispensable part of the transportation itself—delivery and receipt. The Petitioner seeks to refer to this transfer of title or possession as a "local" event, quite separable from the interstate transportation —as something occurring after interstate transportation had ceased. But the facts are plainly to the contrary. This oil, it may fairly be said, merely collided with and rebounded from the periphery of the City of New York in its uninterrupted and continuous journey

from New Jersey to the high seas. It has been settled by a long line of decisions of this Court that all the component parts of a transaction in interstate commerce are equally within the protection of the Commerce Clause. For example, it is said in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290 (1921): "Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and *all the component parts* of that intercourse." It is immaterial whether the transfer of title occurs at the beginning or end of the interstate movement (*Ibid.*, p. 291). A tax upon any one component part of an interstate transaction is thus just as much a burden on interstate commerce as a tax upon any other component part. Shipment, transportation, delivery and receipt at destination are all equally a part of the interstate transaction, as is also the execution of the contract calling for such a transaction. It is not, as a matter of law, even necessary that the contract shall expressly stipulate for interstate delivery if in fact such was, as in the case at bar, the "normal, contemplated and followed course" of dealings, as stated by Mr. Justice HOLMES in *Western Union* v. *Foster*, 247 U. S. 105, 113 (1918). Certainly no case can be cited to indicate that the transfer of title and possession of goods which takes place as part and parcel of the delivery thereof as the final step in an interstate transaction can be severed from that transaction, treated as a local event, thus deprived of the constitutional shield and taxed. On the contrary, local taxes, even when (for the purpose of giving them unquestionable local character) shaped as use taxes, must, this Court has indicated, be imposed upon a use not "so closely connected with delivery as to be in

substance a part thereof." "Things acquired or transported in interstate commerce," said Mr. Justice CARDOZO in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937) at page 582, "may be subjected to a property tax, non-discriminating in its operation, when they have become part of the common mass of property within the State of destination." But, the opinion states, at page 583, "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself." This statement is clearly predicated upon the premise that "the sale itself" (where, as here, title passes coincidentally with delivery at the conclusion of an interstate transaction) is not locally taxable.

In the case at bar the "unloading" was accomplished by one and the same act which constituted the transfer of title and possession, viz: the discharge of oil from a hose nozzle into the ship's bunkers. The oil in the case at bar "never acquired a situs in the city; it therefore could not "become part of the common mass of property within" the city. This, as previously noted, has been definitely decided in the case at bar, and not appealed from by the City. From this it is clear that the Petitioner concedes that there was no "taxable moment" such as that referred to by Mr. Justice REED in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939), following the passage of title and possession, during which the New York City use tax could be imposed. If this is so it is beyond dispute that the tax here sought to be imposed is a tax upon "the sale itself," in interstate commerce, which Mr. Justice CARDOZO so strongly indicated would be objectionable.

B.

The Tax Is An Absolutely Direct Burden On Interstate Commerce

Having demonstrated, as we believe, that the transaction here sought to be taxed is one of the integral parts of an interstate transaction, it scarcely seems open to contest that to tax it constitutes a burden upon such interstate commerce. The City Sales Tax Law imposes a direct tax (collectible by the City from either the purchaser or the seller) of 2% upon the gross "Receipts from Sales of Certain Properties • • • in the City of New York," the word sale to include "transfer of title or possession or both." It is impossible to conceive of a burden more direct than a gross receipts tax levied upon a sale which is effectuated as an integral and simultaneous part of an interstate delivery by the vendor to the purchaser as in the case at bar. To permit such a burden would be to reverse the long settled holdings of this Court that no direct burden upon interstate trade shall be permitted.

As was said in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255-256 (1938):

> "• • • local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed • • • with equal right by every state which the commerce touches, merely because interstate commerce

> is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. • • • The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."

Whether the tax in the case at bar be regarded as a tax upon the receipts from sales (as by the exact terms of the City Law it is) or as merely *measured* by the receipts, the deterrent effect upon commerce is identical and the constitutional limitation equally necessary.

The case at bar would seem to fall clearly within the principles and reasoning underlying the decision in the recent case of *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939), where at page 439 it is stated:

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. • • • Such multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden de-

pends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

If the City of New York is to be permitted to impose a tax upon or measured by the gross receipts from an interstate transaction upon the theory that transfer of title or possession takes place within its borders, the State of New Jersey should with equal right be permitted to impose a tax upon or measured by the identical receipts upon the ground that another essential component part (for example, delivery to the interstate carrier) of the interstate transaction takes place within its borders. In this case the State of New Jersey having jurisdiction over the oil could but for the constitutional protection easily enforce such a tax. A tax upon any component part of an interstate transaction is just as much a burden upon interstate commerce as a tax upon any other part. No one component part can be singled out as subject to tax without opening the door to a cumulative tax burden.

POINT II

Comments on arguments in Petitioner's brief.

Preliminary Note

Petitioner having made his brief in the *Berwind-White* case his main brief and incorporated it by reference in his brief in the case at bar, we have addressed ourselves

principally to his main brief and our page references in this Point II are to the *Berwind-White* brief.

A.

As To Point II In Petitioner's Brief

It will, we think, make for clarity and simplicity in replying to Petitioner's arguments if we deal first with his novel suggestion (raised for the first time in his application for reargument before the Court of Appeals) that the sales tax here involved is "factually • • • identical" with the California use tax and that the sale here involved would, if it had taken place in California, have been subject to the California use tax.

In his brief and argument before the Court of Appeals Petitioner rested his case primarily upon a supposed identity between the facts of the case at bar and the case of *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169 (1935), Point II C of his brief reading: "*The* Wiloil, Banker Bros. *and* McNeel Marble *cases are squarely in point.*" (*Banker Bros.* v. *Pennsylvania*, 222 U. S. 210 [1911]; *McNeel Marble Co.* v. *Graves*, 247 App. Div. 242, aff'd 275 N. Y. 601 [1937].)

The Court of Appeals, however, as noted in Point I of our brief, found as a fact that in the case at bar the Respondent's contract was for specific oil stored in New Jersey and therefore necessarily involved transportation across the State boundary. That finding, of course, disclosed a clear distinction between the case at bar and the three cases just cited[1] and led the Petitioner to seek a

[1] The case of *Graybar Electric Co.* v. *Curry*, 308 U. S. (November 6, 1939), cited at page 22 of Petitioner's brief is, of course, distinguishable upon the same grounds as are the *Banker Bros.* and *Wiloil* cases (*supra*), upon the authority of which it was expressly affirmed.

new anchorage for his arguments. He therefore turned to the recently decided cases of *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939); and *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939) (involving use taxes) and asserted in his brief annexed to his petition (p. 17) that "The New York City sales tax is, moreover, *identical* in substance with the California tax • • • sustained in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra,* as the following tabular comparison plainly shows:" He then set forth a tabular comparison identical with that now appearing on page 20 of his brief *except for one very significant item.* The table in his former brief concluded with the following now omitted item of supposed identity:

"California Tax.	"New York City Tax.
7. The tax is on a local event, *i. e.*, 'the exercise of right or power • • • incident to the ownership of that property other than resale."	7. The tax is on a local event, *i. e.*, the 'transfer of title or possession or both, for any purpose other than resale.'"

Of course this omitted item of comparison is the key to the whole distinction between the California use tax and the sales tax in the case at bar, and the key to the decisions in the *Southern Pacific* and the *Felt & Tarrant* cases, *supra.* Petitioner quotes from the *Southern Pacific Co.* v. *Gallagher* case this Court's words:

> "State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon a choice of the thing taxed." (Italics Petitioner's.)

We respectfully submit that the words italicized should have been "*but upon a choice of the thing taxed.*" The "choice of the thing taxed" in the California statute is

not identical with that taxed under the New York sales tax. As set forth in the omitted item of Petitioner's tabular comparison, the California tax is on the exercise of any right or power over tangible personal property *incident to the ownership of that property.* The taxable event must therefore necessarily follow *after* the acquisition of ownership. The New York tax, *per contra*, is upon the transfer of title or possession,—a taxable event which must necessarily *precede* ownership.

At page 21 of his brief Petitioner makes the extraordinary statement:

> "In *Southern Pacific Co.* v. *Gallagher, supra*, the Court upheld the California tax as applied to the *sale and delivery of goods to the purchaser across State lines*, even though the goods were consumed in interstate commerce immediately after their receipt by the purchaser. In short, the tax was imposed upon the transfer of the property to the railroad company in California. The New York City sales tax is imposed upon precisely the same event—the transfer of the coal to the purchasers in New York City." (Italics ours.)

Petitioner has completely misread the *Southern Pacific* case. The railroad company did not acquire either title to or possession of the property in California. The property was acquired by the railroad company in other States and brought into California on its own way bills. This Court found, of course, that the taxable event was the "use" of the property in California by the railroad company during a "taxable moment" after its transportation had ceased and before its installation as an instrument of new interstate commerce had begun.

The Petitioner's argument that a tax upon a use is factually identical with a tax upon "the sale and delivery of goods to the purchaser across State lines" was expressly rejected by this Court in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, Mr. Justice CARDOZO saying at page 587:

> "Finally, there is argument that the tax now in question, though in form upon the use, was in fact upon the foreign sale, and not upon the use at all, the form being a subterfuge. The supposed basis for that argument is a reading of the statute whereby the use shall not be taxable if the chattel was manufactured by the user or received as a legacy or acquired in any way except through the medium of purchase, and a retail one at that. But the fact that the legislature has chosen to lay a tax upon the use of chattels that have been bought *does not make the tax upon the use a tax upon the sale.*" (Italics ours.)

In *Felt & Tarrant Mfg. Co.* v. *Gallagher* (*supra*), so strongly relied upon by Petitioner, this Court rested its decision solidly upon the *Silas Mason* case, quoting (p. 67) from it the following language:

> "'The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.
>
> 'Things acquired or transported in interstate commerce may be subjected to a property tax, nondiscriminatory in its operation, *when they have become part of the common mass of property within the state of destination.* • • • This is so, indeed, though they are still in the original packages. • • • For like reasons they may be subjected, *when once they are at rest*, to a non-discriminatory tax upon use or enjoyment. • • • A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common

that its validity has been withdrawn from the arena of debate.'" (Italics ours.)

In the instant case the oil never did become a part of the common mass of property in the State, nor was there even a taxable moment between the end of interstate transportation and the commencement of use in foreign commerce. There never was an intrastate taxable event. This has been found as a fact by the Appellate Division:

> "* * * there was no break in transit. * * * The oil was immediately * * * pumped from the lighters into the bunkers of the ship and thereupon became a part of the ship. The vessels themselves had no taxable situs here. (*Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; *Ayer & Lord Co.* v. *Kentucky*, 202 U. S. 409; *People ex rel. Astor Trust Co.* v. *State Tax Commission*, 174 App. Div. 320, 324.)"

The foregoing demonstrates to a mathematical certainty the complete lack of foundation for Petitioner's statement on page 23 of his brief that "Upon that analysis it is clear that *this* taxpayer could be compelled to pay *this* tax upon *these very transactions*, had they taken place in California, under the California use tax statute."

That an attempt to designate as a *use* tax the imposition of the New York sales tax on the "delivery of goods to the purchaser across State lines" (Petitioner's brief, p. 21) would be invalidated by this Court is indicated with crystal clarity by Mr. Justice Cardozo at page 583 of the *Silas Mason* case (*supra*), where he says:

> "* * * a tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself."

One more comment seems pertinent as to this Point II of Petitioner's brief: If Petitioner is correct in his contention that the sales tax is identical with the California use tax, he is completely out of court. The New York City Personal Property tax, which supplements its sales tax here involved, has been held to be a "use" tax. See *Williamsburgh Power Plant Corp.* v. *City of New York*, 255 App. Div. 214 (2nd Dept. 1938); affirmed without opinion, 280 N. Y. 551 (1939).

The Appellate Division held in the case at bar that the oil was not subject to the New York City Personal Property tax, stating at page 240 of 254 App. Div. (R. 297):

> "Finding as we do, that the New Jersey shipments never came to rest and acquired no situs in this State and that the interstate or foreign commerce was uninterrupted and continuous, the Personal Tax Law also did not apply. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582; *Minnesota* v. *Blasius*, *supra*, p. 10.)"

The Petitioner took no appeal from this determination and argued in the Court of Appeals only that the oil was subject to the sales tax. He has acquiesced in the lower Court's determination that the oil is not subject to a use tax and is bound thereby. If, therefore, the sales tax is, as Petitioner contends, a use tax, there remains no question for determination by this Court.

B.

As To Point I In Petitioner's Brief

As to the introductory paragraph of and Subdivision A (p. 14) of Point I in Petitioner's Brief, we think it

sufficient to point out that the fundamental test of constitutionality in the cases so far decided by this Court has been, as we see it, the question whether the burden imposed by the State tax under consideration on commerce was direct or remote.

In the case of *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290 (1922), cited and relied upon by Petitioner at this point in his Brief, this Court put the matter in a nut-shell, saying, at page 294:

> "• • • The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

As to Subdivision B (p. 16) of Point I of Petitioner's Brief, Petitioner tries to picture the situation in the case at bar as one in which a purely local market, fenced about like the market-places of the Middle Ages, is involved. The fact is, of course, that we are here dealing with a case where the buyer *did* want particular goods from another State; did not intend to use and never did use the goods within the City; ordered the goods delivered to foreign ships having no situs in the City,—all as a part of continuous transactions in interstate and foreign commerce, the goods never (as the Courts below have found) coming to rest in the City. These goods never, in any real sense, came inside the fence surrounding this supposed market-place of "centuries ago". This is more like the levying of tribute by an Arab chieftain on a passing caravan than it is like a marketing tax on

merchants trading in goods brought inside a fenced-in market-place.

C.

As To Point III In Petitioner's Brief

We agree with the Petitioner that the discussion of the problems here involved in the recent cases cited on page 40 of his brief is more important than the historical review to which he devotes pages 24-39. We note that in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938) this Court stated that on the particular facts of that case "So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the *doctrine that gross receipts from interstate commerce may not be made the measure of the tax.*" (Italics ours.) But where, as in *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307 (1938) and *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939) the tax was "measured by the entire volume of the interstate commerce in which appellant participates," the doctrine that gross receipts may not be made the measure of the tax was applied. And it was emphasized that "the generality and nondiscriminatory character of the exaction • • • will not save the tax if it directly burdens interstate commerce" (p. 312, Adams opinion).

Petitioner persists in ignoring the fact that by definition within the law itself the City Sales Tax Law is a tax on gross receipts and is "measured by the entire volume of the interstate commerce in which" Respondent "par-

ticipates". Section 2 reads: "Imposition of tax * * * There shall be paid a tax upon *the amount of the receipts from every sale* in the City of New York as follow: * * *." (Italics ours.) Payment is to be made by the purchaser to the vendor, *in default of which the vendor must himself pay.* The fundamental fact cannot be escaped that the tax is on the transaction of interstate transportation and sale and that it is measured by a percentage of the very proceeds of sale.

That such a tax is capable of being exacted in more than one State is obvious, as we have already made clear in Point I of this Brief. It is a tax on "a transfer of title or possession" which, in the case at bar, was one and the same act in law and in fact as that delivery of the oil which was an integral part of an uninterrupted interstate transportation. There can be nothing "remote" or "attenuated" in the impact of such a gross receipts tax; and no basis for an exception to the rule that an unapportioned gross receipts tax measured by the entire interstate transaction in which both vendor and purchaser participate shall not be permitted. Such a tax, if permissible, could clearly be duplicated by a New Jersey tax on some other component part of the interstate transaction (as for example a tax imposed upon all deliveries to carriers for shipment, including intrastate as well as interstate shipments) also measured by the full amount of the gross receipts.

D.

As To Point IV In Petitioner's Brief

Petitioner argues (p. 46 of his brief) that the tax in question is upon a purchaser-consumer and therefore cannot be a tax upon interstate commerce because "the

purchaser for consumption is not engaged in interstate commerce." We can see no possible merit in such a contention. Commerce is *inter*course. There must be more than one party to *inter*course. "Commerce", said this Court in *The State Freight Tax*, 15 Wall. 232 (1872) at page 275, "consists in selling the superfluity, *in purchasing articles of necessity*, as well as * * *." (Italics ours.) The Respondent here was most certainly "purchasing articles of necessity" for use in carrying on foreign commerce.

The sales tax is, of course, a tax upon the sale, not upon the "purchaser-consumer". It is upon an interstate transaction and whether it is the vendor or the purchaser who pays it is immaterial.

In *Brown* v. *Maryland*, 12 Wheat. 419 (1827) at page 442, Chief Justice MARSHALL disposed of the contention that the tax there involved was "not a tax upon the article, but upon the person" by saying "this is varying the form, without varying the substance."

In *Eastern Air Transport* v. *Tax Commission*, 285 U. S. 147 (1932) at page 152 this Court said:

> "Undoubtedly, *purchases* of goods within a State, may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity." (Italics ours.)

Again in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218 (1928) at page 222:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests."

So here, the tax is, by definition, levied on the gross receipts from the transfer of title or possession; and it is by this transaction that the tax is measured and on which the burden rests. Compare the comment of Mr. Justice Stone in the *Western Live Stock* case (*supra*) at page 260, "If broadcasting could be taxed, so also could reception." So here: if delivery could be taxed so also could shipment.

E.

As To Point V In Petitioner's Brief

Very little comment seems required as to this Point. Petitioner suggests that to invalidate this tax would enable local *merchants* to keep their goods in warehouses across the Hudson River and put up a sign stating "Buy Here and Avoid the Sales Tax."

No honest merchant could do that unless he added "But Pay the Personal Property Tax." For although the fuel oil in the case at bar, on the peculiar facts of this case, was exempt also from the "use" tax, the proper enforcement of the "use" tax and the sales tax taken together will, we submit, tap a sufficiently copious source of revenue without resorting to the breaking down of the proper constitutional safeguards covering situations such as those in the case at bar.

F.

As To The Particular Brief In The Case At Bar

The discussion of the points immediately preceding has been directed to the corresponding points in the petitioner's brief in the *Berwind-White* case as indi-

cated at pages 19-20, *supra*. With reference to the brief filed in the case at bar it seems unnecessary to add further comment except to call attention to the emphasis placed at page 9 thereof upon the concession made by the Respondent that it was taxable with reference to deliveries made from storage tanks within the City of New York. In the Appellate Division Respondent conceded that a sale tax of $292.83 be paid on the two emergency deliveries of oil borrowed by the Standard Oil Company. As stated by the Respondent in its brief in the Appellate Division: "This concession is made because of the small amount of tax involved in these items, since we understand that the question of taxability of local deliveries of bonded oil is now being litigated in a case [*Gulf Oil Corporation*, No. 473] where the total tax involved is many times the tax on these two items."

The opinion of the Appellate Division, recognizing the limited purpose of the concession made by Respondent (petitioner in that Court) stated:

> "As to the emergency deliveries originating at Staten Island, the petitioner concedes for the purpose of this case only that the sales tax of $292.83 should apply. Because of this concession the determination under review with respect to such amount of tax will be confirmed. By such confirmation, however, we are expressing no opinion respecting the taxability of such sales" (R. 296-297).

It is therefore readily apparent that in making the aforesaid concession Respondent waived none of its arguments as to any of the other deliveries in question.

POINT III

The fuel oil is not subject to the New York City Sales Tax because at all times it retained its distinctive character as an import under the protection of Article 1, Section 10, Clause 2 of the Constitution of the United States as well as that of the Commerce Clause; it never acquired a situs within the City of New York or became a part of the mass of property within the City.

All of the fuel oil involved in this case was either bonded or drawback oil. In addition there was diesel oil (constituting less than 5% of the total; Exh. 27, R. 257, 148) most of which was drawback oil although some small part was of domestic origin (R. 196).

A.

As to the Bonded Oil

The greater part of the oil in question was bonded oil (R. 196). This oil was fuel oil imported in a refined state, requiring and being subjected to no processing whatsoever in the United States (R. 188). This refined oil, originating in Venezuela, was pumped directly from the importing vessels, without the payment of import duties, into bonded tanks of the seller in New Jersey supervised by a United States customs storekeeper, where it was kept separate from any other property of the seller; from these tanks it was pumped into barges sealed by Government inspectors and thence transported to ship's side in New York and pumped, under customs supervision, into Respondent's vessels (which had no situs in the City of New York) on the eve of their sailing for foreign ports (R. 191, 121). Not until the oil was so pumped into the vessels was release from bond given.

On these facts, which are not disputed, it seems impossible to contend that this oil, sold in its original refined state exactly as imported, lost its distinctive character as an import or became commingled with the general mass of property of the State or City. As stated earlier in this brief, its contact with the periphery of the City was purely tangential. Under such conditions we believe the law to be clear that neither the State nor the City could tax the oil or its sale, directly or indirectly. We are dealing here not only with the question of a burden upon foreign commerce but with a positive constitutional prohibition against anything which is the equivalent of a duty or an impost upon imports.

The leading case, of course, applicable to the situation is *Brown* v. *Maryland*, 12 Wheat. 419 (1827), in which the State of Maryland sought to impose a license tax on all importers of foreign articles or commodities. The indictment was "against the importer, for selling a package of drygoods in the form in which it was imported, without a license". The opinion of the Court was delivered by Chief Justice MARSHALL, who held such a tax repugnant not only to the constitutional prohibition against imposts on imports, but also to the Commerce Clause. Taking up first the prohibition against State taxes on imports he held that it would be a nullity if it permitted a tax upon the goods, upon their sale, or upon the privilege of selling them prior to the time they had become commingled with the general mass of property in the State. On the contention that the tax was merely a tax on a person, not the thing imported, the Chief Justice commented (p. 444):

> "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general;

> as if it were confined to a particular mode of doing the forbidden thing. *All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.* • • • So, a tax on the occupation of an importer is, in like manner, a tax on importation. *It must add to the price of the article, and be paid by the consumer, or* by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution." (Italics ours.)

It would seem obvious that a tax on the privilege of buying (which appears to be the Petitioner's conception of the nature of the tax in the case at bar), paid by the consumer, would have been just another case of "varying the form, without varying the substance" and equally invalid.

Taking up next the applicability of the Commerce Clause, the Chief Justice said (pp. 446-447):

> "Commerce is intercourse — one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. • • • Any charge on the introduction and incorporation of the articles into and with the mass of prop-

erty in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of the regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation".

The case of *Brown* v. *Maryland* has been consistently followed to this day. As was said by this Court in *Norfolk & Western Railway Co.* v. *Sims*, 191 U. S. 441, 449 (1903):

"• • • for the past seventy-five years and ever since the original case of *Brown* v. *Maryland*, 12 Wheat. 419, we have uniformly held that States have no power to tax directly or by license upon the importer, goods imported from foreign countries or other States, while in their original packages, *or before they have become commingled with the general property of the State and lost their distinctive character as imports.* • • • The case is one of the most important ever decided by this Court, and has been adhered to by a uniform series of decisions since that time". (Italics ours.)

See also *Anglo-Chilean Corp.* v. *Alabama*, 288 U. S. 218 (1933), which held invalid a franchise tax on an importer landing and selling nitrates in their original form, this Court pointedly saying (p. 225):

"The question whether, consistently with the imports and commerce clauses, the Alabama statute may be construed to require appellant to pay the specified franchise tax is dual in form but single in substance, for, upon the facts of this case, it is clear that if the exaction is a tax on imports it necessarily burdens foreign commerce".

And see, in addition, *Cook* v. *Pennsylvania*, 97 U. S. 566, 573 (1878).

In *Brown* v. *Maryland (supra)* the Chief Justice, in discussing the particular facts of that case, said (pp. 441-442):

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form *or* package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution". (Italics ours.)

It seems to us that the facts in the case at bar are, as to the bonded oil at any rate, in every essential particular identical with those in *Brown* v. *Maryland* except for the added consideration that under the facts in the case at bar Governmental seals and supervision rendered *impossible* the commingling with the mass of property in the country. This refined oil was kept absolutely "in the *original form* or package *in which it was imported*" and was delivered in that condition direct into the bunkers of Respondent's vessels, remaining the property of the importer right up to the instant of delivery.

B.

As to the Drawback Oil

The drawback oil is crude oil imported from South America, upon which the duty is paid, the oil being refined at the seller's plants in New Jersey, and upon delivery of the refined oil to Respondent's steamships, the duty being refunded (R. 189). Except for the fact that

the oil is processed after instead of prior to importation, and the duty conditionally paid, instead of not being paid at all, the facts as to this drawback oil in the case at bar are identical with those set forth, *supra*, as to the bonded oil. It is at all times refined, stored, delivered and sold under Government supervision and is never permitted, as a fact, to become commingled even with other oil owned by the importer which is free from these restrictions or commingled with the bonded refined oil referred to under A, *supra* (R. 193-194).

As to the immunity of oil that enters the United States in a crude state and is thereafter refined or processed before sale the Petitioner will doubtless argue that the case of *Gulf Fisheries Co.* v. *MacInerney*, 276 U. S. 124 (1928), prevents the application of the principles laid down in *Brown* v. *Maryland*. (The case can, of course, have no application to the refined bonded oil.) In that case a tax measured by the weight of certain fish sold by the plaintiff was held not a tax on imports because (without deciding whether fish taken from the sea were imports) the Court held "On the facts agreed, the tax is not paid until the fish have lost their alleged distinctive character as imports, and have become, through processing, handling and sale, a part of the mass of property subject to taxation by the State" (p. 126). The fish in question were treated in various ways, some sold locally, others interstate, none, however, being kept carefully segregated, as was the oil in the case at bar, *earmarked for shipment out of the country* so as to enable the importer to "draw back" import duties conditionally paid.

We think it clear that the retention by the importer of imported goods in their original imported state is only

one of the tests by which may be determined the really critical question whether the goods have become commingled with the general mass of property within the State. Where they are processed, as were the fish, and there is no other factor which prevents the commingling, the tax can be upheld; but the United States Government itself in the case at bar took great care to see that this oil was not commingled and therefore we believe that the real *ratio decidendi* of *Brown* v. *Maryland* justifies immunity for this oil.

We wish to make it clear that we do not argue that the fact that property is in a bonded warehouse necessarily protects it from tax. Domestically manufactured products placed in bonded internal revenue warehouses are not *ipso facto* immune (*Carstairs* v. *Cochran*, 193 U. S. 10 [1904]). But we do contend that the handling of this oil under Government control was such that it was never permitted to be commingled with the general mass of property and that it therefore left the country without losing its distinctive character as an import. Had any circumstance permitted it to become commingled, the Government would have refused to permit the draw back of the import duties.

In commenting on the different treatment of property sold in its original form or package in cases concerned simply with interstate commerce as contrasted with those involving imports, Chief Justice TAFT, in *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 510 (1923), said:

> "The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce".

The oil in the case at bar, therefore, having retained throughout its character as an import, is immune irrespective of the question whether or not the tax is a burden on interstate commerce. As stated in *Low* v. *Austin*, 13 Wall, 29, 34 (1871):

> "Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax."

Only one comment seems necessary upon the Petitioner's argument on this import point. At pages 19 and 20 of his brief in the *Gulf Oil Corporation* case (No. 473) Petitioner sums up his argument on the point with the following statement:

> "The features of the instant tax which become significant in the light of the foregoing cases are these:
>
> (1) *it is imposed after the importer has parted with control;*
>
> (2) it is imposed not on the importer but on the purchaser.
>
> Clearly, then, the tax is not within the condemnation of any case decided by this Court, and is perfectly valid." (Italics ours.)

The italicized statement is not true and is in direct conflict with petitioner's own description of the tax as on "the transfer of the title or possession, or both"; see page 21 above. The tax is not imposed *after* the importer has parted with control; it is imposed on the *parting* with such such control by the importer.

POINT IV

The proposed imposition of the City Sales Tax on the transfer of title and possession of the fuel oil at the moment of its discharge into the bunkers of Respondent's foreign flag vessels engaged in the carriage of passengers and merchandise to foreign ports would violate Article 1, Section 10, Clause 2 of the Constitution of the United States prohibiting State taxation of exports.

A.

The Proposed Taxation of the Fuel Oil Would Constitute Taxation of the Process of Exporting the Merchandise Carried in Respondent's Vessels

The consumption of the fuel oil by Respondent's vessels is an absolute *sine qua non* of the exporting process in which those vessels were regularly engaged. It was sold and delivered solely for that purpose.

A Federal tax upon "the vellum, parchment or paper upon which" a bill of lading was written was held invalid in *Fairbanks* v. *United States,* 181 U. S. 283, 293 (1901), the Court saying that the freedom of exports from tax or duty

> "* * * requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation, and, as we have shown, a stamp tax on a bill of lading, which evidences the export is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export".

Similarly as to a Federal stamp tax on a charter party for the carriage of cargo from United States to foreign ports (*United States* v. *Hvoslef*, 237 U. S. 1 [1915]); a Federal stamp tax on ships' export manifests (*New York & Cuba Mail Steamship Co.* v. *United States*, 125 Fed. 320 (D. N. Y., 1903); reversed on other grounds, 200 U. S. 488 [1906]); and a Federal stamp tax on insurance policies covering exports (*Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19 [1915]), this Court pointing out in the latter case (p. 27):

> "• • • the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, nor with distinct or separable subjects; the tax falls upon the exporting process."

The foregoing taxes were held to be prohibited under Article 1, Section 9, Clause 5 of the Constitution prohibiting the Federal Government from taxing "*Articles* exported from any State" (Italics ours) upon the ground that the constitutional prohibition covers not only a direct tax on *articles*, but any tax which burdens the exporting process. The prohibition against the States set forth in Article 1, Section 10, Clause 2 of the Constitution is broader in its language,—in terms forbidding "Imposts or Duties on Imports or Exports" rather than simply upon "Articles exported", and the constitutional immunity from State taxation of exports is, therefore, if anything broader than the immunity from Federal taxation.

If bills of lading, manifests and insurance policies are a part of the exportation process and therefore not to be

taxed, *a fortiori* the fuel necessarily consumed in the process of exportation should be exempt.

It will be urged by the Petitioner that the cases of *Eastern Air Transport* v. *Tax Commission*, 285 U. S. 147 (1932) and *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939) show that a tax upon this fuel oil is not to be invalidated as an alleged burden on foreign commerce. Those cases dealt only with alleged burdens on interstate commerce. They dealt only with an alleged infringement upon the exclusive right of Congress to regulate commerce. They did not involve, as does the case at bar, the violation of a *positive constitutional prohibition* which (as interpreted by this Court in the *Hvoslef* and other cases cited *supra*) forbids any burden whatever on the process of exportation.

On page 38 *supra* of this Brief we quoted Chief Justice TAFT's language emphasizing that the problem of whether a tax is a burden on interstate commerce or not is not to be confused with the problem of the extent of immunity *granted to the process of importation* arising from Article 1, Section 10, Clause 2 of the Constitution. We think it equally clear that the problem involved in cases holding that taxes upon the intrastate use of car wheels or sale of gasoline destined to be used in interstate commerce do not unconstitutionally burden that commerce are not to be confused with the problem of the extent of the immunity *granted to the process of exportation* arising under that same Clause 2.

A positive constitutional prohibition against a tax which interferes with importation or exportation can very properly be held to constitute a shield of larger circum-

ference than that implied from the necessity of preventing interference with the exclusive power of Congress to regulate commerce.

At the port of New York some of the foreign steamship lines berth their vessels on the Jersey side of the Hudson, some on the New York side. It seems incongruous that those on the Jersey side should be free of this proposed burden on their exportation of merchandise while those on the New York side should pay tribute.

B.

The Deliveries of Fuel Oil in Question Are, Themselves, "Exports" Within the Meaning of Article 1, Section 10, Clause 2 of the Constitution

We believe that the case at bar presents also the proper occasion for this Court to pass for the first time upon the question whether fuel oil supplied to foreign vessels for consumption on the high seas on direct voyages to foreign ports are "exports" within the meaning and intent of the Constitution.

In *Swan & Finch Co.* v. *United States*, 190 U. S. 143 (1903), this Court held, in interpreting the drawback statute in its then form, that the word "exportation" did not include supplies furnished to foreign trade vessels consumed at sea, saying in that connection (p. 145): "Another country or State as the intended destination of the goods is essential to the idea of exportation". The Court was construing not the Constitution but the words of the statute granting a privilege and under well known rules of construction construing the words strictly.

In contrast, this Court in *United States* v. *Chavez*, 228 U. S. 525 (1913), decided ten years later, in construing

another statute making criminal the "export" of certain articles held that within the meaning of that statute the crime was complete upon shipment and that no allegation that the goods were landed in a foreign country was necessary. Here again no question of constitutional interpretation was actually involved. By way of dicta the Court commented (pp. 529-530):

> "In common speech the shipment of goods from this to a foreign country without regard to their landing in such country is often spoken of as an export. It is true also that for the purposes of the provisions of § 9, Article I, of the Constitution, prohibiting the laying by Congress of a tax or duty 'on articles exported from any State' and of § 10, Article I, forbidding any State, without the consent of Congress, to 'lay any imposts or duties on imports or exports,' a shipment is considered as the initiation of export so as to bring the goods shipped within the protection of the constitutional safeguards. *Almy* v. *California*, 24 How. 169; *Fairbank* v. *United States*, 181 U. S. 283. Despite, however, the significance given to the words to export in these cases, it is nevertheless certain, as stated by the court below, that by a practically unanimous concensus of opinion, accurately speaking, exportation in the complete sense consists of two essential ingredients—the sending of merchandise from this to a foreign country and its landing in such country. But the question which we are called upon to solve, that is, the meaning of the words 'to export' as used in the joint resolution, may not be disposed of by any mere abstract consideration of the meaning of the words, but their signification must be determined with reference to the text of the resolution itself."

Neither of these cases had occasion to go to the root of the question as to the purpose and intent of the constitu-

tional prohibition against levies on exports. As Chief Justice MARSHALL said in *Brown* v. *Maryland (supra)*, in discussing "imports" under this Clause 2, at page 438:

> "If we quit this narrow view of the subject, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation."

We believe that the fundamental object of the prohibition against levies on exports was that each State of the Union should have free opportunity to market its products *outside the boundaries of the United States.* We can see no reason for assuming that the protection of this external market was to be limited to products landed on a foreign shore. This Court can well take judicial cognizance of the fact that when the Constitution was adopted a not inconsiderable volume of products must have been consumed in supplying to ships under foreign flags the stores needed for consumption at sea. When British sailing ships took off from New York to India they required supplies to last months. What basis can there be for supposing that it was intended to permit New York, for instance, to levy tribute on the business of supplying ship's stores to vessels leaving its port for foreign shores although New York was forbidden to do so as to their cargoes? Passing to the situation as it exists today; if one interior State produces oil or coal primarily suited to consumption as bunkers and with little or no market on foreign soil, is it to be shut out of its exterior market, unless it pay tribute to a seaboard State because the oil or coal is never landed abroad, while its neighbor interior State producing fuel much in demand for consumption within foreign countries is to be free of this tribute?

In the Clause of the Constitution here under consideration the prohibition is against imposts on "Imports or Exports". This close juxtaposition of the two terms makes judicial holdings as to the meaning of "Imports" as applied to articles brought from the high seas, or applied to ship's supplies consumed on board, pertinent, by analogy, as to the proper meaning to be given the word "Exports" in converse situations.

In *Procter & Gamble Mfg. Co.* v. *United States*, 19 U. S. C. C. P. A. 415 (certiorari denied 287 U. S. 629 [1932]), whale oil manufactured at sea on a foreign factory ship when brought into the United States was held to be "imported" although the statute involved referred to articles "imported *from any foreign country*". (Italics ours.)

In *United States* v. *Gully*, 9 F. (2d) 959 (S. D. N. Y. 1922), the Court said:

> "I interpret the words, 'import' and 'bring into', as meaning any carriage of goods from outside the United States within its borders, and in the absence of any authority to the contrary I do not hesitate to define those words in that sense. • • • I have no doubt whatever that, if a ship lies off the four-league limit, and a small boat comes out and takes liquor from her, and carries it into the United States, the small boat has imported the liquor within the United States."

To the same effect *Perry* v. *United States*, 39 F. (2d) 52 (C. C. A. 5, 1930), and *Awalt* v. *United States*, 47 F. (2d) 477 (C. C. A. 3, 1931), decisions by the Circuit Courts of Appeals of the Fifth and Third Circuits, respectively.

In *Booth Fisheries Corp.* v. *Case*, 182 Wash. 392 (1935), the Court invalidated a State "catch tax" on salmon caught on the high seas as a levy on imports, the Court holding "That fish caught in the Pacific Ocean beyond the territorial limits of the State are imports, when brought into the State, is not open to question."

In *Gulf Fisheries Co.* v. *Darrouzet*, 17 F. (2d) 374 (D. Tex. 1926) (affirmed *sub nom. Gulf Fisheries* v. *McInerney*, 276 U. S. 124 (1928), discussed *supra* at p. 37 of this Brief) the Court said as to fish caught on the high seas and brought into Galveston (at p. 376):

> "Considering these contentions in their order, we think as to the first contention it is sufficient to say that the Constitution prohibits taxes on imports, that these fish certainly are imports (that is, objects or things brought into the United States), and that whether they are articles of commerce in the ordinary sense is wholly immaterial. The word 'import', used in statutes, has been given the broadest construction. See *United States* v. *Sischo*, 262 U. S. 165, 43 S. Ct. 511, 67 L. Ed. 925."

This Court held on appeal in the above case that it had "no occasion to enquire whether the fish are imports" (p. 126) because they had, when taxed, become part of the common mass of property in the country.

And although ship's stores remaining on a ship after her arrival in port, are not dutiable as imports, because they never become commingled with the mass of property in the country, (cf. *The Conqueror*, 166 U. S. 110 [1897]), wines brought in as ship's stores from abroad for consumption by the crew on board while in port were held to be within the provisions of the Eighteenth Amendment prohibiting the "importation" of intoxicating

liquors for beverage purposes. *Cunard Steamship Co., Ltd.* v. *Mellon*, 262 U. S. 100 (1923). In that case this Court stated, at pages 121 and 122:

> "Some of the contentions ascribe a technical meaning to the words 'transportation' and 'importation'. We think they are to be taken in their *ordinary* sense, for it better comports with the object to be attained. • • • Importation, in a like sense, consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act." (Italics ours.)

The underlying basis of interpretation running through the foregoing cases appears to be that "import" and "importation" are words to be taken in their ordinary sense of bringing into the territorial jurisdiction of the United States and "exports" or "exportation" are to be taken in their ordinary sense of taking out of the territorial jurisdiction of the United States without intent to return, unless, in either case, the *purpose* of the statutory law or of the constitutional provision applicable compelled a different conclusion.

The purpose of the constitutional prohibition against State levies on exports certainly does not compel a contrary conclusion. This purpose as we have stated above was, we submit, to safeguard the markets of the several States for their products for consumption outside the boundaries of the United States. There was no more justification for permitting levying of tribute by the State within which lay the port of exit in the case of goods to be consumed on the high seas by foreign ships than in the case of goods to be consumed on foreign shores.

POINT V

Respondent is entitled on the present record to have this Court sustain the judgment of the Court below, if necessary, upon the grounds set forth in Points III and IV, *supra*.

Lest it now be argued that since the Court of Appeals was silent on the two points last raised in this brief (which were not argued before it although advanced in briefs before the Appellate Division) this Court may not properly consider them, Respondent begs leave to point out:

The trial was an administrative proceeding. Having proved all necessary facts, Respondent by its counsel at the close of the hearing made a formal statement claiming violation of Respondent's constitutional rights both under the Commerce Clause and under the clause prohibiting state taxation of exports (R. 227). In its petition to the Supreme Court of the State of New York Respondent specifically claimed a violation of Article I, Section 10, Clause 2 of the Constitution (R. 8). The Appellate Division of the Supreme Court having found the tax invalid as a violation of the Commerce Clause did not discuss the export-import points although both these points were advanced in the briefs before it. In the Court of Appeals and in opposing the petition for a writ of certiorari Respondent was defending the orders already made. Furthermore, by advancing one argument on the preliminary question whether a writ should be granted Respondent waived none of the other arguments previously made.

The right of a respondent to raise additional points to sustain the judgment* was succinctly described by this Court in *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937):

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *Frey & Son* v. *Cudahy Packing Co.*, 256 U. S. 208; *United States* v. *American Ry. Express Co.*, 265 U. S. 425; *United States* v. *Holt State Bank*, 270 U. S. 49, 56; *Langnes* v. *Green*, 282 U. S. 531; *Stelos Co.* v. *Hosiery Motor-Mend Corp.*, 295 U. S. 237, 239; *cf. United States* v. *Williams*, 278 U. S. 255."

See also *Langnes* v. *Green*, 282 U. S. 531, 538 (1931):

> "Respondent here defends that decree [of the court below] upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. His right to do so is beyond successful challenge, * * *."

See also *United States* v. *American Railway Express Co.*, 265 U. S. 425 (1924) in which this Court said at page 435 that it is

> "settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or of insistence upon matter overlooked or ignored by it."

---

* Affirmance by this Court *solely* on the ground that the tax is invalid as a tax upon an import may require the remanding of the case to determine what part of the Diesel oil (representing less than 5% of the total) was produced from domestic crude oil; see page 32, *supra*.

True, this Court has at times restricted the scope of inquiry in the argument before it* but such opinions announce nothing more than "a rule of practice." *Langnes* v. *Green*, 282 U. S. 531, 538 (1931). Of course the *power* to consider all questions exists (*ibid.*). It may be that at times this Court has remanded a case to the Court below for consideration of a point not previously raised there; *e. g.*, *Zellerbach Co.* v. *Helvering*, 293 U. S. 172 (1934); *cf. Clifton Mfg. Co.* v. *United States*, 293 U. S. 186, 188 (1934). No useful purpose, however, would be served by remanding the case at bar to the Court of Appeals for consideration of the points urged in Point III and Point IV of this brief, because that Court, in the contemporaneously argued case of *McGoldrick* v. *Gulf Oil Corporation* (No. 473) indicated clearly that its holding on these points would have been in favor of the Respondent in the case at bar.

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* For example, this Court has refused to permit a petitioner to argue any error other than that set forth in his petition, *Clark* v. *Williard*, 294 U. S. 211 (1935); *Morehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587 (1936); *Commercial Credit Co.* v. *United States*, 276 U. S. 226 (1928); or to permit a respondent who failed to file a petition to claim that the judgment below was in any respect erroneous; *Federal Trade Com.* v. *Pacific Paper Assn.*, 273 U. S. 52 (1927); *Alexander* v. *Cosden Co.*, 290 U. S. 484 (1934). This Court, of course, will find nothing binding or even persuasive in these decisions.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be affirmed; but in the event of (1) an adverse decision upon the Federal question forming the basis of the decision of the Court of Appeals coupled with (2) a refusal by this Court to consider the Federal questions briefed in Points III and IV *supra*, the case should be remanded to the New York Court of Appeals for consideration of these latter questions.

Dated, New York, N. Y., December 29, 1939.

Respectfully submitted,

HAROLD S. DEMING,
Counsel for Respondent,
80 Broad Street,
New York, N. Y.

DONALD HAVENS,
BERNARD D. ATWOOD,
Of Counsel.

APPENDIX

New York City Personal Property Tax

For the year 1935, No. 25 of 1934, as amended by No. 13 of 1935.

Sec. 1. Imposition of Tax. During the period commencing on January first, nineteen hundred and thirty-five, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid by the owner a tax of two per centum upon the value of the following-named *articles of personal property situated or owned within the City of New York:*

* * * *

(k) Oil, gas, gasoline and other combustibles.

Sec. 2. Exemptions. No tax, as imposed by Section one of this title shall be due or payable in any event upon any of the articles enumerated in the said section one, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the Comptroller.

* * * *

(c) That the said article is one *upon the receipt from the sale of which a tax has been paid* pursuant to the provisions of this law or local law number twenty of nineteen hundred and thirty-four, as amended. [The City "Sales Tax"] (Italics ours).

* * * *

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 44

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

BRIEF OF *AMICI CURIAE*

GEORGE DEFOREST LORD,
WOODSON D. SCOTT,
Counsel for Cunard White Star Limited, Amici Curiæ,
No. 25 Broadway,
New York, N. Y.

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No. 44

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

BRIEF OF AMICI CURIAE.

This brief is filed by special leave of Court, pursuant to Rule 27, paragraph 9, with written consent of all parties to the case, dated November 29, 1939, and filed with the Clerk.

Preliminary Statement.

The statement in respondent's brief adequately relates the facts. The picture presented is one of a movement of oil originating in Venezuela (R. 105, 197), carried to Bayonne and Bayway, New Jersey, there landed and deposited in tanks of the Standard Oil Company of New Jersey (R. 191), supervised by United States customs storekeepers (R. 189, 193), transported thence in barges sealed by customs inspectors and discharged under customs supervision into vessels of foreign registry (R. 64) engaged in foreign trade, which in a short time thereafter leave this

country for foreign ports (R. 85, 120). The oil is of two classes: (1) bonded oil, which on importation is placed in bonded tanks at Bayonne, New Jersey, without payment of import tax (R. 188), and (2) drawback oil, which on importation in crude form is placed in tanks at Bayonne and Bayway, New Jersey. The import tax is paid on this oil on arrival. It is, however, segregated and identifiable as drawback oil (R. 194). Otherwise it would lose its right to drawback. The United States exempts this bonded and drawback oil from taxation in order to foster and encourage foreign commerce, a subject clearly within federal power.

We contend that in such circumstances the City of New York has no power to impose a tax on receipts from sales of this fuel oil.

Summary of Argument.

I. The sales of bonded and drawback oil involved transactions in interstate and foreign commerce on which the City has no power to impose a sales tax.

II. The bonded and drawback oil never became a part of the general mass of property in the City of New York and therefore is exempt from the New York City sales tax by virtue of the commerce and imports clauses of the Constitution.

III. Fuel oil supplied to vessels engaged in foreign trade is an export and therefore is exempt from the New York City sales tax by virtue of Article 1, Section 10, Clause 2 of the Constitution, prohibiting state taxation of exports.

Conclusion: The Court should rule that the bonded and drawback oil involved in this case is exempt from the New York City sales tax.

ARGUMENT.

I.

The sales of bonded and drawback oil involved transactions in interstate and foreign commerce on which the City has no power to impose a sales tax.

The fuel oil involved in this transaction was delivered from tanks of Standard Oil Company of New Jersey, located at Bayonne and Bayway, New Jersey, to respondent's vessels lying in New York harbor. The deliveries thus made unquestionably were in interstate and foreign commerce. Standard Oil Company of New Jersey has no tanks or other installations in New York. Its only storage facilities or installations from which this bonded fuel oil could be delivered to respondent's vessels are those located at Bayonne and Bayway, New Jersey (R. 192).

The contract of sale between the French Line and Standard Oil Company of New Jersey is in the form of a letter (Taxpayer's Exhibit 10, R. 37, 236). It is an extension of a series of previous contracts (Taxpayer's Exhibits 1-9 inclusive; R. 33-37, 228-235), which show that the commodity contracted for was "Standard" Bunker Fuel Oil (R. 230, 232, 234). At the time the first contract was made Mr. Cauchois of the French Line went to New Jersey on two occasions and inspected the plant of Standard Oil Company of New Jersey there (R. 29, 30). The contracts clearly contemplated that this bonded bunker "C" fuel oil should be delivered to respondent's vessels directly from the installations of Standard Oil Company of New Jersey located in the State of New Jersey (R. 77, 93, 104, 106, 129, 131, 133).

The practice followed under the contracts in making the deliveries confirms the view that the parties contemplated

that the oil should be delivered from the bonded tanks of Standard Oil Company of New Jersey located at Bayonne and Bayway, New Jersey. It is true that in exceptional cases Standard Oil Company of New Jersey found itself short of "Standard" bunker "C" fuel oil when a call for it came in and in such an emergency it had to borrow from one of its competitors (R. 151). This exception occurred only in 5 out of 974 deliveries over a period of 8 years (R. 223-225; Taxpayer's Exhibit 27, R. 148, 257). Respondent did not know that these five deliveries came from the plants of companies other than Standard Oil Company of New Jersey (R. 152, 180). In two of the five deliveries Standard Oil Company of New Jersey borrowed oil from its competitor, Gulf Refining Company, whose installation was at Staten Island, New York (Taxpayer's Exhibit 27, R. 148, 258). In the other three cases in which "Standard" bunker "C" fuel oil was not delivered, the oil was borrowed from competitors of Standard Oil Company of New Jersey, whose installations were also in New Jersey.

(a) The facts are established by the state court.

The state court found as a fact that the contracts between the parties contemplated delivery of this fuel oil by Standard Oil Company of New Jersey from its plants in New Jersey to respondent's vessels (*Compagnie Generale Transatlantique* v. *McGoldrick*, 254 App. Div. 237, 240). The case was heard by the Appellate Division in the first instance pursuant to article 78 of the Civil Practice Act. In making its determination that court decided the questions of fact respecting the contract and the contemplation of the parties in favor of respondent. The Court of Appeals affirmed this determination (*Compagnie Generale Transatlantique* v. *McGoldrick*, 279 N. Y. 192) as it

had already done in a similar case (*National Cash Register Co.* v. *Taylor* (1937), 276 N. Y. 208; certiorari denied 303 U. S. 656). It said (279 N. Y. 198):

> "While the purchase or the contract of sale was made in New York, it was with a view of getting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. The product in New Jersey kept there in tanks, was the thing bargained for."
>
> • • •
>
> "It is the articles of this plant in New Jersey which the purchaser seeks."

The state court's determination of the essential facts respecting the contract and the contemplation of the parties should be accepted in this court.

Dower v. *Richards* (1894), 151 U. S. 658, 663-672;
Gleason v. *White* (1905), 199 U. S. 54, 60;
Minneapolis, St. Louis R. R. Co. v. *Minnesota* (1904), 193 U. S. 53, 64-65;
Wiloil Corp. v. *Pennsylvania* (1935), 294 U. S. 169.

(b) The conclusion of law reached by the state court followed inevitably.

The state court having determined as a matter of fact that the contract contemplated deliveries from New Jersey to New York, its conclusion that the contract was one "for interstate shipments" (279 N. Y. 198) followed inevitably. *Federal Trade Commission* v. *Pacific States Paper Trade Association* (1927), 273 U. S. 52, 64. In that case sales of paper were made by wholesalers to retailers in the same state and the paper was shipped from mills in another state. This Court held that those sales were interstate transactions.

The sales and deliveries of this oil, being transactions in interstate and foreign commerce, are exempt from the New York City sales tax (*Sonneborn Bros.* v. *Cureton* [1923], 262 U. S. 506, 515.)

Additional arguments and authorities on the foregoing points are adequately presented in Point I of respondent's brief and will not be repeated here.

Petitioner's brief on the interstate aspect of this case relies principally upon *Wiloil Corp.* v. *Pennsylvania* (1935), 294 U. S. 169 (p. 8); *Graybar Electric Co. Inc.* v. *Curry* (1939), 60 Sup. Ct. mem. 139, 259 (p. 10), and *Southern Pacific Co.* v. *Gallagher* (1939), 306 U. S. 167 (p. 12).

Wiloil Corp. v. *Pennsylvania, supra,* contains nothing contrary to our contentions here. That case was decided upon the same principle which had been applied before in *Banker Bros.* v. *Pennsylvania* (1911), 222 U. S. 210. The latter case involved sales of automobiles by local dealers to local purchasers. The automobiles were delivered to the dealers from outside the state, but deliveries by the dealer were purely intrastate transactions and were so held by the state court. No attempt was made to tax the interstate sale from the manufacturer to the dealer. Like the *Wiloil* case, there were two sales. One was interstate, from the manufacturer to the dealer. The second was intrastate, from the dealer to the purchaser. In the *Wiloil* case, oil was sold by Wiloil Corporation of Pittsburgh, Pennsylvania, to a local buyer in Pennsylvania. Apparently the seller had no supply of its own anywhere. Under the circumstances, deliveries from a Pennsylvania source would have been within the normal contemplation of the parties to the contract. The state court held that the liquid fuels in question were "sold and delivered to purchasers in Pennsylvania" (p. 174), an intrastate sale. The ruling

on that question was not challenged by the appellant in this Court and was held to be "binding upon it here" (p. 174). This Court therefore affirmed the decision of the state court holding that interstate commerce was not involved or burdened. The other sale by Crane Hook Company of Wilmington, Delaware, to Wiloil Corporation of Pittsburgh, Pennsylvania, an interstate sale, was not taxed or involved in the case.

In the present case, as distinguished from the *Wiloil* case, we have a contract with a seller whose sole source of supply is in New Jersey. There is only one sale involved here, that between the owner of the out-of-state oil and the purchaser.

Graybar Electric Co. Inc. v. *Curry* (60 Sup. Ct. mem. 139, 259), *supra,* was decided upon the authority of *Banker Bros. Co.* v. *Pennsylvania* (222 U. S. 210), *supra,* and *Wiloil Corp.* v. *Pennsylvania* (294 U. S. 169), *supra,* and established no new principle. In the *Graybar* case, the state only attempted to tax the local sale from Graybar Electric Co. Inc. to the intrastate purchaser. The other sale from General Electric Company to Graybar Electric Co. Inc., an interstate sale, was not sought to be taxed by the state.

Southern Pacific Co. v. *Gallagher* (306 U. S. 167), *supra,* construing the California use tax law, contains nothing contrary to our argument here. The articles taxed in that case "had reached the end of their interstate transportation and had not begun to be consumed in interstate operation" (page 177). They were not isolated from other property by any provision of law or official control. The tax was imposed upon "retention and installation", *i. e.,* "storage and use—retention and exercise of a right of ownership" within the state (pages 174, 177). The local law specifically exempted sales from the scope of the tax. The articles were not mov-

ing in interstate commerce when the tax accrued. The goods had come to rest. For that reason, the Court found there was a "taxable moment". There could be no "taxable moment" in this case because the tax was imposed not on use but on sale which was entirely an interstate transaction.

Petitioner's brief argues (page 11) that the danger of multiple taxation is not present in the situation involved in this case. This is incorrect. Multiple taxation is entirely possible if this tax be sustained as to these sales. On petitioner's theory the State of New Jersey could impose a tax, similar in form, on the seller, measured by the amount of gross receipts from sales, as is the present tax. Thus the interstate sale would bear the burden of two or more sales taxes as against one in respect of intrastate transactions. This is the kind of burden on interstate commerce which the Constitution was designed to prohibit. But whether or not multiple taxation is possible, the tax cannot be sustained where as here it is a direct burden on interstate and foreign commerce. It is not necessary for the taxpayer to show discrimination against interstate commerce. That the tax burdens interstate commerce is sufficient to invalidate it. This point was decided by this Court in the *State Freight Tax Case* (1872), 15 Wal. 232, and has been reaffirmed in subsequent cases, including *Crew Levick Co.* v. *Pennsylvania* (1917), 245 U. S. 292, *Spalding & Bros.* v. *Edwards* (1923), 262 U. S. 66, *Sonneborn Bros.* v. *Cureton* (1923), 262 U. S. 506, and *Adams* v. *Storen* (1938), 304 U. S. 307.

II.

The bonded and drawback oil never became a part of the general mass of property in the City of New York and therefore is exempt from the New York City sales tax by virtue of the commerce and imports clauses of the Constitution.

The controlling principles and authorities on this question are discussed in Point I of our brief in *McGoldrick* v. *Gulf Oil Corp., No. 473,* which is to be argued with this case.

III.

Fuel oil supplied to vessels engaged in foreign trade is an export and therefore is exempt from the New York City sales tax by virtue of Article 1, Section 10, Clause 2 of the Constitution, prohibiting state taxation of exports.

We have discussed the authorities in support of our argument on this question in Point II of our brief in *McGoldrick* v. *Gulf Oil Corp., No. 473,* to be argued with this case.

CONCLUSION.

The Court should rule that the bonded and drawback oil involved in this case is exempt from the New York City sales tax.

Respectfully submitted,

George deForest Lord,
Woodson D. Scott,
Counsel for Cunard White Star Limited, Amici Curiæ.

December 30, 1939.

CPT4785

FILE COPY

Supreme Court of the United States

No. 44—October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF THE DECISION BELOW.

Cletus Keating,
H. Maurice Fridlund,
Richard Sullivan,
Earl Q. Kullman,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Supreme Court of the United States

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Compagnie Generale Transatlantique,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF THE DECISION BELOW.

This brief is filed pursuant to Paragraph 9 of Rule 27 of the Rules of this Court. Written consents of all the parties hereto dated October 30, 1939, have been filed with the Clerk.

Preliminary Statement.

The fundamental question involved in the above case is the right of the City of New York to impose a City Sales Tax on certain sales in interstate and foreign commerce. The respondent alternatively claims immunity either under the Commerce Clause of the United States Constitution (Art. I, Sec. 8, Cl. 3) or under the Imports-Exports Clause (Art. I, Sec. 10, Cl. 2) (R. 8).

The *amici curiae* represent taxpayers whose cases are in all respects identical with the respondent's case above and with the respondent's case in No. 473, Gulf Oil Corporation. The disposition of these cases will directly affect the outcome of the *amici curiaes'* cases which are pending in the lower New York courts.

Reference is made to Respondent's Brief for proceedings below and statement of facts.

Summary.

1. The judgment below is founded on concurrent findings by State Courts that the transactions in question were interstate commerce and beyond the taxing power of the State. Particular weight must be given the findings below not only because they were against the State but also because the Court of Appeals adopted as the law of this case an opinion in a companion case in which the State's right was upheld.

2. The State Courts correctly held the sales tax to be a direct tax on interstate commerce.

(a) The rule so stated has been repeatedly declared by this Court and consistently ratified by Congress.

3. Respondent in this case is entitled to immunity under the Imports-Exports Clause in the event that its claim under the Commerce Clause is denied.

4. Respondent in this case is entitled to remand for decision of non-federal questions in the event that reversal is ordered on the federal questions.

ARGUMENT.

FIRST POINT.

REPEATED REFUSAL OF CONGRESS TO ENACT BILLS PERMITTING STATE TAXATION OF INTERSTATE AND FOREIGN COMMERCE MUST BE CONSTRUED AS CONGRESSIONAL APPROVAL OF THE DECISIONS OF THIS COURT.

The New York Courts below have concurrently found the imposition here in question to be on interstate commerce and have annulled a New York tax, on the unquestionable rule of this Court that the Commerce Clause forbids "a direct tax upon interstate commerce" (R. 304):

> "For more than a century, since *Brown* v. *Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. *Webber* v. *Virginia*, 103 U. S. 344; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Robbins* v. *Shelby County Taxing District*, *supra* [145 U. S. 1]; *Leloup* v. *Mobile*, 127 U. S. 640; *Brennan* v. *Titusville*, 153 U. S. 289; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Fisher's Blend Station* v. *State Tax Commission*, *supra* [297 U. S. 650]; *Adams Manufacturing Co.* v. *Storen*, *supra* [304 U. S. 307]. • • • During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been

left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it. See *Western Live Stock* v. *Bureau of Revenue, supra* [303 U. S. 250], 254, et seq., and cases cited."

Gwin, White & Prince Inc. v. *Henneford,* (1939) 305 U. S. 434, 441.

The rule has also been stated thus:

"The commerce clause itself, without action by Congress, is a charter of freedom in interstate and foreign commerce from State interference with repect to those activities which in view of their nature demand uniformity of regulation, if they are to be regulated at all. In such matters, the silence of Congress indicates that this freedom is to be left unimpaired. It is in this sense that it has been held that the States cannot impose what is deemed to be a 'direct burden' on interstate commerce. Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or upon the privilege of engaging in it, or upon the receipts, as such, derived from it, or upon persons or property in transit in interstate commerce. The States have no power to prohibit interstate trade in legitimate articles of commerce, or to discriminate against the products of other States, or to exclude from the limits of the State, corporations or others engaged in interstate commerce, or to fetter by conditions their right to carry it on."

Hughes—*The Supreme Court of the United States,* 1928, pp. 145-6.

There have been numerous attempts, uniformly unsuccessful, to secure legislation to permit the result for which the petitioner here contends. At least as early as the 73rd Congress, 1st Session, there was introduced in the Senate the Long Bill (S. 1155) "To limit the effect of the regulation of commerce between the several states and with foreign countries." There have been at least fifteen of these bills introduced in Congress, all of which are set forth in Appendix A, Part 1, *infra*, pp. 11-13. The latest bill on this subject is the Colmer Bill (H. R. 1818, 76th Congress, 1st Session), having an identical purpose.

These bills have uniformly failed of passage.

Added to this, are four Memorials from the Legislatures of the States of Indiana, Minnesota, Tennessee and North Dakota, which are set forth in Appendix A, Part 2, memorializing Congress to enact legislation similar to the bills referred to here, *infra*, p. 14.

In the face of this Congressional history, a reversal of this or any of the companion cases would be tantamount to legislation by judicial fiat.*

---

* The Harrison Bill (S. 2897, 73rd Congress, 2nd Session) passed the Senate but died in the House Committee under circumstances that strongly indicate that the original passage was under a misapprehension of the true nature of the bill. The Congressional history of this bill is set forth in full in Appendix A, Part 1, *infra*, p. 11. The debates in Congress (78th Cong. Rec., Part 5, pp. 4597-8) and the Report of the Committee on Interstate Commerce (Report No. 440, Senate Reports, 73rd Congress, 1st and 2nd Sessions) bear out the contention made at the hearings before the House Committee on Interstate and Foreign Commerce that such misapprehension existed (Statement of John C. Gall, p. 83, Interstate Sales Tax, Hearings of Feb. 26, March 28 and April 11, 1934).

SECOND POINT.

THE IMPOSITION OF THE NEW YORK CITY SALES TAX ON THE IMPORTATION AND EXPORTATION OF THE FUEL OIL PURCHASED BY RESPONDENT IS VIOLATIVE OF THE IMPORTS-EXPORTS CLAUSE.

Respondent, French Line, invoked Art. I, Sec. 10, Cl. 2 of the Constitution of the United States (R. 8). The New York Courts sustained respondent's claim of immunity under the Commerce Clause and did not pass on its distinct and clear immunity under the Imports-Exports Clause. Respondent's claim of immunity under that clause has been preserved and is an issue which must be adjudicated in the event that there is a reversal on the claim under the Commerce Clause. Petitioner's Brief does not discuss the point.

The pertinent portions of that clause are, "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports * * * and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress" (Art. I, Sec. 10, Cl. 2).

Respondent's Brief, pages 29-46, carefully analyzes the testimony as to the importation of all the oil here in question, its temporary storage under actual or constructive custody of the United States, its bonded and Government

supervised transit from Government custody to the bunkers of French liners preparing for a quick "turn-around" (R. 295).

The rapid transportation of all the oil here in question through New York was a basis for the lower Courts' decisions under the Commerce Clause; the same factor requires a finding that both Imports and Exports were involved. Decisions cited by Respondent establish that the tax imposed was beyond the power of the State.

Companion cases also involve Art. I, Sec. 10 [Imports-Exports Clause]. Respondent's claim to immunity under that clause cannot be decided on the authority of Commerce Clause cases. The Imports-Exports Clause was adopted specifically to avoid levies of the kind here attempted.*

---

* "A very material object of this power was the relief of the states which *import and export through other states*, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between state and state, it must be foreseen, that ways would be found out, to load the articles of *import and export, during the passage through their jurisdiction*, with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured, by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquillity. To those who do not view the question through the medium of passion or of interest, the desire of the commercial states to collect, in any form, an indirect revenue from their uncommercial neighbours, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamours of an impatient avidity for immediate and immoderate gain." (Italics ours.)

The Federalist, No. 42, Madison, Jan. 22, 1788.

The obvious applicability of the Clause to the type of state taxation here in question has been restated by modern commentators.*

The Senate has recently evidenced awareness of the vitality and plain intendment of the Clause. [See First Point.] Memorials from four States seeking passage of National Legislation authorizing taxation of interstate commerce were presented in 1935 (Appendix A, part 2). The first two were referred to the Interstate Commerce Committee; the last two, however, were referred to the Committee on Finance, one by Senator Harrison, the author of the bill under consideration. The only reason for referring the Memorials to the Finance Committee was the realization that under Art. I, Sec. 10 "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States" (Art. I, Sec. 10, Cl. 2).

---

* "It will be observed that the trend of modern cases is to hold that the congressional power over commerce given by the commerce clause (Clause 3, Section 8) alone is sufficient to negative and make unconstitutional any attempt by a state to tax either an import from a foreign country or an import from a sister state. The tendency of the decisions, in other words, is to leave Clause 2 of Section 10 ineffective, to make it meaningless, to deprive it of that full significance its length, position and actual language give to it. *If so it is a vestigial clause. Why not evolve it again into usefulness?* In fact, if the commerce clause has always had the efficacy it has now, this lengthy, distinctive language in Clause 2 never did have any usefulness. Surely the language giving the federal government the right to all net revenue has meaning. It certainly meets any objection that a state could fatten itself on taxes, and it implies that the clause may have been inserted for the purpose of handling the *New York provincialism of long ago.*" (Italics ours.)

Chambliss, at 30 Ill. Law Review, 829. See also "*Documents Illustrative of the Formation of a Unio.. f the American States,*" 1927, page 630.

Historians have described the painful lessons of New York's levies on imports from New Jersey and Connecticut in the year of the Constitution, *The Critical Period of American History*, John Fiske, c. IV, pp. 144-147, and the current press records a trend to similar conditions resulting from levies such as this.*

The Imports-Exports clause was drafted and adopted to prevent levies of the kind here imposed and should be enforced.

THIRD POINT.

THE SALES TAX IS NOT A "USE" TAX.

The belated assertion of Petitioner that the sales tax is a "use" tax is strikingly inconsistent with the introduction by the President of the New York City Council, in 1938, of a "compensating use tax," law which would replace the New York City Personal Property Tax Law, but not the Sales Tax Law.† The City administration perhaps proposed the new law before it decided to contend that the sales tax was a "use" tax.

FOURTH POINT.

RESPONDENT'S RIGHT TO LOCAL DECISION ON QUESTIONS OF LOCAL LAW MUST BE PRESERVED.

Respondent's petition (R. 7) asserts illegality under the State Enabling Act (Laws of 1934, ch. 873, see Petitioners'

---

* A person is under arrest and held for trial in New York for bringing to New York three cartons of cigarettes purchased in New Jersey, admittedly for his own consumption, *City of New York* v. *Crain*, New York City Magistrate's Court, Municipal Term, No. 7767.

† Minutes of the New York City Council, June 21, 1938, p. 1305.

Appendix of Statutes, p. 22). The State courts did not pass on this issue, and, in the event of reversal on Federal grounds, this Court will remand for consideration of local questions. *State Tax Commission et al.* v. *Van Cott*, (1939) 306 U. S. 511.

LAST POINT.

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

Chetwood Keating (Signed)
H. Maurice Fridlund (Signed)
Richard J. Sullivan
Carl P. Kullmann

Counsel for
KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
as *Amici Curiae*.

120 Broadway
City, County and State
of New York

December 30, 1939

APPENDIX A.

PART 1.

73rd Congress, 1st Session

Bill No.	*Introducer*	*Title*
S. 1155	Long	To limit the effect of the regulations of commerce between the several States and with foreign countries. Introduced 4/6/33. Referred to Committee on Interstate Commerce, 77 Cong. Rec., Part 2, p. 1324.
H. R. 3769	Reilly	To divest certain activities of their interstate character. Referred to Committee on Interstate and Foreign Commerce 3/17/33. 77 Cong. Rec., Part 2, p. 607.

73rd Congress, 2nd Session

H. R. 8231	Boehne	To regulate sales in interstate commerce. Referred to Committee on Interstate and Foreign Commerce 2/24/34. 78 Cong. Rec., Part 3, p. 3168.
S. 2897	Harrison	To regulate interstate commerce by granting the consent of Congress to taxation by the several States of certain Interstate Sales. Referred to Committee on Interstate Commerce 2/26/34. 78 Cong. Rec., Part 3, p. 3177; Reported with amendment and report (No. 440), 3/8/34, 78 Cong. Rec., Part 4, p. 3958; debated and passed 3/15/34, 78 Cong. Rec., Part 5, pp. 4597-4598; rec'd in House 3/20/34; referred to Committee on Interstate and Foreign Commerce, 78 Cong. Rec., Part 5, p. 4978.
H. R. 8303	Sadowski	To regulate sales in interstate commerce; 2/27/34 Referred to Committee on Interstate and Foreign Commerce, 78 Cong. Rec., Part 3, p. 3367.

Bill No.	*Introducer*	*Title*
H. R. 8913	Swank	To regulate interstate commerce by granting the con[illegible] of Congress to the several States to levy certain taxes upon property and capital employed, business done, and sales made in interstate commerce; limiting the power to levy such taxes to property and capital employed, business done, and sales consummated within such State; preventing double taxation; and preventing political subdivisions of any State from levying taxes or excises upon such property and capital employed, business done, and sales made in interstate commerce; 2/2/34 Referred to Committee on Interstate and Foreign Commerce, 78 Cong. Rec., Part 6, p. 5876.
	74th Congress, 1st Session	
H. R. 3971	Lea	To regulate sales in interstate commerce; Referred to Committee on Interstate and Foreign Commerce 1/14/35, 79 Cong. Rec., Part 1, p. 429.
S. 994	Harrison	To regulate sales in interstate commerce; Referred to Committee on Interstate Commerce, 1/15/35, 79 Cong. Rec., Part 1, p. 441.
	74th Congress, 2nd Session	
H. R. 12928	Lord	To divert certain activities of their interstate character; Referred to Committee on Interstate and Foreign Commerce 6/1/36, 80 Cong. Rec., Part 8, p. 8622.

75th Congress, 1st Session

Bill No.	*Introducer*	*Title*
H. R. 1619	Chandler	Relating to sales and contracts to sell in interstate and foreign commerce; Referred to Committee on Interstate and Foreign Commerce 1/15/37, 81 Cong. Rec., Part 1, p. 34.
H. R. 4214	Colmer	To regulate sales in interstate commerce; Referred to Committee on Interstate and Foreign Commerce 2/2/37, 81 Cong. Rec., Part 1, p. 741.
H. R. 4268	Lord	To divest certain activities of their interstate character; Referred to Committee on Interstate and Foreign Commerce 2/3/37, 81 Cong. Rec., Part 1, p. 820.
H. R. 7824	Chandler	Relating to sales of goods and contracts to sell goods in interstate and foreign commerce; Referred to Committee on Interstate and Foreign Commerce 7/12/37. 81 Cong. Rec., Part 6, p. 7089.

75th Congress, 2nd Session

H. R. 8550	Boren	To divest certain activities of their interstate character; Referred to Commerce on Interstate and Foreign Commerce 11/30/37, 82 Cong. Rec., Part 1, p. 584.
H. R. 1818	Colmer	To regulate sales in interstate commerce; Referred to Committee on Interstate and Foreign Commerce ..../..../39, 84 Cong. Rec., Part 1, p. 148.

APPENDIX A.

PART 2.

Memorial from Legislature of Minnesota seeking Congressional consent to State taxation of sales and gross income of interstate commerce. Referred to Committee on Interstate Commerce 3/12/35, 79 Cong. Rec., Part 3, p. 3428.

Memorial from Legislature of Indiana seeking passage of Harrison Bill (S. 2897, 73rd Cong., 2nd Session); Referred to Committee on Interstate Commerce 3/12/35, 79 Cong. Rec., Part 3, pp. 3427-8.

Memorial from Legislature of Tennessee seeking passage of Harrison Bill (S. 2897, 73rd Cong., 2nd Session); *Referred to Committee on Finance* 3/14/35, 79 Cong. Rec., Part 3, p. 3590.

Memorial from Legislature of North Dakota seeking passage of Harrison Bill (S. 2897, 73rd Cong., 2nd Session); *Referred to Committee on Finance* 3/18/35, 79 Cong. Rec., Part 3, p. 3802.

SUPREME COURT OF THE UNITED STATES.

No. 44.—October Term, 1939.

Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner,
vs.
Compagnie Generale Transatlantique.

On Writ of Certiorari to the Supreme Court of the State of New York.

[March 25, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

This is a companion case to No. 475, *McGoldrick* v. *Berwind-White Coal Mining Company*, decided January 29, 1940, brought here to review a judgment of the New York State Supreme Court that the New York City tax laid upon sales of goods for consumption, is an unconstitutional burden on interstate commerce.

Upon certiorari to review a determination by the Comptroller of the City of New York that respondent was subject to a New York City tax upon sales to it of fuel oil in 1934 and 1935, the Appellate Division of the New York Supreme Court held that the taxing statute as applied did so infringe. 254 A. D. 237. The Court of Appeals affirmed, 279 N. Y. 192, with opinion, on the single ground that the tax was unconstitutional by reason of its effect on interstate commerce, and by its amended remittitur the court stated that the affirmance was on the sole ground that the tax violated the commerce clause. 280 N. Y. 691. We granted certiorari, 307 U. S. 620, upon a petition which assailed the determination of the state court that the tax was a prohibited burden on interstate commerce, the question being of public importance.

The relevant provisions of the taxing act are set out in our opinion in the *Berwind-White Coal Mining Company* case, and need not be repeated here. The Appellate Division found facts not challenged here as follows: Appellant, a corporation of the Republic of France, owns vessels and operates them in the transportation of passengers and freight between the Port of New York and France, and other foreign countries. It is authorized to do business, and maintains an office in New York City, where in the course of its business it makes purchases of fuel oil for consumption in the operation of its vessels, from the Standard

Oil Company of New Jersey, which also maintains an office and carries on business in the City. That company enters into long-term contracts with the respondent, negotiated and signed in the City, for the sale to respondent of its requirements of fuel oil as ordered, to be delivered alongside respondent's vessels in New York Harbor. All the sales presently involved were of oil stored by the Standard Oil Company in its tanks in New Jersey, which as ordered were transported by barge to respondent's vessels in New York City where it was delivered.

The oil thus transported and delivered to respondent was of two types. One, "bonded fuel oil", is refined oil imported by the Standard Oil Company from foreign countries and stored in bond in New Jersey without payment of import duties, pursuant to the revenue laws of the United States which authorize release from the bond upon delivery of the oil to a foreign steamship for export or use as fuel by the vessel. The other type, known as "drawback oil", is the product of crude oil imported from foreign countries by the Standard Oil Company and refined at its New Jersey plant. An import duty is paid upon the oil, but upon delivery of the refined oil to a foreign steamship for export, or for use as fuel on the vessel, the importer is entitled under the revenue laws to a refund or drawback on the duty paid. 19 U. S. C. §§ 1309, 1313, 46 Stat. 690, 693.

So far as the validity of the tax with respect to the interstate commerce is concerned, our decision sustaining it in the *Berwind-White Coal Mining Company* case is controlling, and the judgment must be reversed, unless the state of the record is such as to entitle respondent to assail the tax upon constitutional grounds not urged or decided in the state courts.

Respondent's petition to the New York Supreme Court to review the determination of the Comptroller set out that the tax "was assessed upon the purchase price paid on transactions in interstate and foreign commerce" and that the City was "without power to impose said tax on said transactions by virtue of the provisions of the Constitution and the laws of the United States," specifying the commerce clause and Article I, § 10, Clause 2, prohibiting "imposts or duties on imports or exports". No mention was made of any applicable statute of the United States.

Respondent's brief and argument here advance as reasons in support of the judgment of the state court in its favor that the bonded

oil and drawback oil, at the time of delivery to respondent, retained their character as imports, and that they were then in process of being exported, so that the tax imposed upon the delivery to the purchaser is a prohibited impost or duty on imports and exports.

Respondent concedes by its brief that the contentions it now makes were not argued in the New York Court of Appeals, and does not deny petitioner's assertion here that respondent stated in its brief in the Appellate Division, "The court need give no attention to them", and that by its brief in the Court of Appeals respondent explicitly limited its presentation of the case to the interstate commerce point. Whether, under the practice of the Court of Appeals, respondent was in the circumstances free to ask decision of these questions there, we are not advised. But in any event the record does not disclose that they were presented to the Court of Appeals, the highest court of the state in which decision could have been had whose decision we review, and it shows that that court considered and passed upon only the interstate commerce question.

By virtue of the petition for certiorari addressed to the constitutional question which the state court decided, this Court has jurisdiction of the cause. And respondent, in urging decision here of the constitutional questions not pressed in the state court, relies on the familiar rule of appellate court procedure in federal courts that, without a cross-petition or appeal, a respondent or appellee may support the judgment in his favor upon grounds different from those upon which the court below rested its decision. *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435; *Langnes* v. *Green*, 282 U. S. 531. See *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, 269.

But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225; *Duignan* v. *United States*, 274 U. S. 195, 200. In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance

with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. *Dewey* v. *Des Moines*, 173 U. S. 193; *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633; *Whitney* v. *California*, 274 U. S. 357, 362, 363; *N. Y. ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317.

Like considerations, we think, require us to refuse to entertain such new grounds of attack as a support for a state judgment of invalidity based on an erroneous construction of the Constitution. In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned.

Upon the remand of this cause for further proceedings not inconsistent with this opinion, the state courts will be free to decide any federal question remaining undecided here which, in conformity with their own procedure, may be raised for decision there, and the remand will be without prejudice to the further presentation of any such question to this Court.

Reversed.

The CHIEF JUSTICE and Mr. Justice ROBERTS concur in the view that the questions relating to foreign commerce are not properly before us in this case, but think that the judgment of the state court, holding that the tax as here laid places an unconstitutional burden upon interstate commerce, should be affirmed upon the grounds stated in the dissenting opinion in No. 475, *McGoldrick* v. *Berwind-White Coal Mining Company*.

Mr. Justice MCREYNOLDS and Mr. Justice MURPHY took no part in the consideration or decision of this case.